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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 758

RONALD E. GATES,
Petitioner,

vs.

P. F. COLLIER, INC., a Delaware Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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P. F. COLLIER, INC., a Delaware Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of the United States District Court for the District of Hawaii which ruled that respondent recover on its counterclaim from petitioner the sum of $306,676.23 (Rec. 686)[1] and dismissed petitioner's claim.

1—Rec. refers to the Record on Appeal.

1. OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals of the Ninth Circuit is reported in 378 F. 2d 888. It is also set forth in the appendix to this petition. The opinion of the United States District Court of Hawaii is reported in 256 F. Supp. 204.

2. STATUTORY PROVISION SUSTAINING JURISDICTION

The judgment of the Court of Appeals of the Ninth Circuit was entered on June 14th, 1967; petitioner filed a petition for rehearing on July 13th, 1967 and on July 26th, 1967, said petition for rehearing was denied.

The jurisdiction of this Court rests on Section 1254(1) of the Judicial Code 28 U.S.C. The district court maintained jurisdiction under 18 U.S.C. 1332, diversity of citizenship.

3. QUESTIONS PRESENTED AND HOW RAISED

Several questions are presented. They were all specifically raised in the Courts below.

A) Whether the April, 1960 and September, 1961 Gates-Collier contracts were in violation of the Foreign Exchange and Foreign Trade Control Law of Japan in that the contracts violated several material sections of said Japanese law.

B) Whether under New York law, a contract entered into in New York to violate a law at the place of performance (Japan) is also illegal in New York.

C) Whether if said contracts were illegal under said Japanese law, petitioner was not entitled to recovery under New York law (New York being place of enrichment) on a quantum meruit basis in that the illegality (violation of Japanese Foreign Exchange law) was malum prohibitum only.

D) Whether a decree of the Tokyo District Court may be summarily disregarded by a trial court on ground that it was based on an alleged false affidavit when it is elementary in the United States that "a judgment of a sister state cannot be challenged on ground that it was obtained by false testimony or perjury". A like comity should be allowed Japanese Court orders.

E) Whether although the evidence is undisputed that the contract is to be performed in Japan on the question of alleged fraud, the substantive law of fraud of Japan or the substantive law of fraud of New York should be applied. That is to say whether "lex loci" should be the law and the law of Japan be applicable or New York's latest "center of gravity" theory in conflict of laws should be the law and the law of the center of gravity be applicable.

F) Whether book sales contracts to be performed in Australia (in pounds), in Japan for sales to Japanese civilians (in yen) and in Japan for sales to United States military personnel (in U. S. dollars) were not severable in that the agreements were severable and parties dealt with them as being divisible.

G) Whether when petitioner followed written directions of respondent, respondent may later claim fraud for following such written directions.

H) Whether respondent having terminated a contract may later sue for alleged obligations recited in said contract arising after the date of termination.

I) Whether respondent may recover attorney fees in a case of this nature, there being no statute allowing such fees.

J) Whether the evidence and law can sustain the judgment and ruling of the Trial Court, affirmed by the Court of Appeals.

4. STATUTES AND REGULATIONS INVOLVED

Involved is the Foreign Exchange and Foreign Trade Control Law of Japan a copy of which is in evidence. The copy is an official English translation of said law. (Plaintiff's Exhibit 98 in evidence) Also involved is Article XIX of the treaty between Japan and United States effective June 22nd, 1960.

5. STATEMENT OF THE CASE

This case involves a complaint filed on July 9th, 1964, in the United States District Court of Hawaii by Gates, petitioner, regarding commissions in the sum of $422,804 allegedly due petitioner Gates from respondent Colliers for the selling of Collier's encyclopedias in the sum of $1,810,262 (U. S. Dollars) in Japan, Australia, and other Pacific countries during the period April, 1960 to October, 1962. (Rec. 361) Colliers filed counterclaims in the sum of $833,115. (Rec. 381) Answers were filed to the complaint and counterclaim.

By written interrogatories and answers, a substantial portion of the material facts was admitted by respondent. The jury waived trial was materially aided especially in the area of arithmetic, by a stipulation between counsel that all interrogatories and answers on record and requests to admit with the admissions on record, may be consid-

ered by the trial court without any restrictions. (Tr. 295-297) The interrogatories, answers and admissions are part of the record in this Appeal. (Rec. 19-278)

A trial was had and on the evidence adduced the Trial Court held for the respondent on the counterclaim in the sum of $306,676.23 and dismissed petitioner's claim. Petitioner appealed to the Circuit Court of Appeals, Ninth Circuit. Decision of Court below was affirmed.

6. THE FACTS

Respondent, Collier, a Delaware corporation, is a publisher of encyclopedias. Starting on or about 1954 Petitioner Gates, a native of Dallas, Oregon (Tr. 236) then living in Japan, started selling Collier's encyclopedias in Japan under an arrangement whereby Gates purchased Collier's encyclopedias outright at $69.00 per set under a strictly buyer-seller arrangement. (Tr. 72) Gates also started selling Collier's encyclopedias on an independent contractor basis to military personnel serving in Japan. This dual arrangement continued till later reduced to written agreements. By 1959 there existed between Colliers and Gates & Son Co., a Japanese corporation, two written contracts. The first contract, Plaintiff's Exhibit 5 in Evidence, expressed the abovementioned buyer and seller agreement at $69.00 per set. The second contract dealing with military sales on an independent contractor basis is evidenced by Plaintiff's Exhibit 4 in Evidence.

On or about April 15, 1960, an agreement consolidating the abovementioned agreements, Exhibits 4 and 5, into a single contract, Plaintiff's Exhibit 1 in Evidence, was entered into between Petitioner Gates personally and Collier. (Plaintiff's Exhibit 2 in Evidence replaced said Exhibit 1 in September, 1961, for reasons immaterial herein.)

Collier Corporation after entering said agreement Exhibit 1 registered to do business in Japan. Japan was then and still is under Foreign Exchange and Foreign Trade Control Law. (Exhibit 98) Collier was already experienced in the area of international monetary manipulations in that Collier had prior "trouble" in black market operations of getting U. S. Dollars out of countries where there was exchange control, for example it cost Collier a painful $.25 (U. S.) per U. S. Dollar to get money out of Egypt. (Exhibit 118) Therefore Collier started its business in Tokyo with as little of its own U. S. Dollars as possible and tried to get the maximum out as possible, including Gates' share of the proceeds of sale. It started on the Japanese yen equivalent of $3,600.00 advanced by Gates and books borrowed from Gates Co. (Tr. 350) They intended to not pay Gates his commissions on Japanese yen sales till yen accumulated from the sales of Colliers books in Tokyo. The selling was done for Gates by about 15 salesmen of R. E. Gates & Son Co., Ltd. (Tr. 269) A set of encyclopedia with an Atlas and Dictionary sold for 92,700 Japanese yen or $269.50 (U. S. Dollar equivalent). Under Exhibit 1 above mentioned Gates was immediately entitled to 34% ($83.84) of the net sales price as sales Commission on any sale, cash or term, even where down payment was $10.00. (Plaintiff's Exhibit 1 in Evidence) If 50% of the purchase price were paid within 15 months, Gates was entitled to another 7%. Gates was allowed to give a 5% discount to each customer but where he did not give the 5% discount, he was allowed to keep the 5% himself. (Plaintiff's Exhibit 17 in Evidence) If sales reached a million dollars per 12 month period he was entitled to a 2% bonus and 1% if in excess of half a million but below a million. (Plaintiff's Exhibits 1 and 2 in Evidence)

The contract further provided that Gates guarantee Colliers against loss by reason of bad accounts. (Plain-

tiff's Exhibits 1 and 2 in Evidence) A so called 12.5% expected loss clause was written into the agreement so that in effect any losses in excess of 12.5% of the sales will be charged against Gates and if there were no losses Gates received the 12.5%. By losses under the April, 1960 and the September, 1961 agreement Colliers meant "loss to Collier during the term of this agreement". (Tr. 418) (Plaintiff's Exhibit 1 in Evidence)

The evidence below was uncontradicted regarding the contract of April, 1960 and its substitute of September, 1961, being divisible into three parts:

a) Sales to Japanese Civilian (97B) and Japanese Schools (99B)

b) Sales to U. S. Military Personnel (96B)

c) Sales in Australia (98B)

"B" meant a separate branch, a Colliers designation even in the United States. The parties agreed to give the parts the numbers indicated and each part was operated and dealt with and accounted for separately. (Plaintiff's Exhibit 9 in Evidence) The employees for each part were separate groups. 97B and 99B Sales (Japanese Civilian and Schools) were necessarily conducted by a Japanese Sales staff in Tokyo with sales in Japanese Yen. The U. S. Military personnel Sales (96B) were handled by another set of salesmen operating out of the Collier Tokyo office on a U. S. Dollar basis, clearly separate and apart from the foregoing 97B and 99B. (Tr. 123, 164) The Australian Sales 98B was under a separate contract made in January, 1962 and it was handled through a separate staff and office in Sydney, Australia. Australian sales were in Australia and sales were in Australian Currency. (Tr. 173-175) Gates was charged by Collier for alleged fraud on the 97B (Japanese Civilian and Schools) accounts but as

for the 97B (Military) and 98B (Australian) accounts, by Collier's own admission in Court by Mr. Brown (counsel) there was no wrong committed and the alleged fraud if any was with respect to said 97B (Japanese Civilian) account only. (Tr. 35-36) Therefore Gates argued in the Court below that as for the 96B (Military) and 98B (Australian) parts of the divisible contracts Colliers had no defense. The contracts were subject to termination only upon the giving of two weeks' written notice. No such notice was given till sometime in October, 1962. Gates claims that all parts of the divisible contracts were never terminated lawfully till October 16, 1962, and the summary possession and takeover by Colliers of all three parts of said divisible contracts, in May, 1962, was illegal.

Gates introduced an official English translation of the Japanese Foreign Exchange and Foreign Trade Control Law in evidence. (Plaintiff's Exhibit 98 in Evidence) Gates contended in the Court below that Colliers knowingly schemed and planned to violate said Japanese Law when prior to April 15, 1960, it was licensed under said Japanese Foreign Exchange Law to receive in New York $69.00 (U. S. Dollars) per set for its encyclopedia sold by Gates Co. in Tokyo, Japan (Plaintiff's Exhibit 23 in Evidence), but subsequent to said date after Plaintiff's Exhibit I was entered into, Collier was licensed to receive $172.50 (U. S. Dollars) for the same set of encyclopedia. (Plaintiff's Exhibit 24 in Evidence) Collier's General Superintendent and Assistant Secretary Simon J. Nork admitted in his sworn answers to interrogatories filed in this cause that the sudden increase in the import licenses from $69.00 per set to $172.50 per set was the *"proper value to assign to each set of Collier's Encyclopedia for Japanese currency control purposes."* (Rec. 261) The abrupt increase was due to a scheme to send out of Japan, funds Colliers could not legally send out, an out and out "yami" opera-

tion, meaning black market in Japanese. Appellant Gates contended in the Court below that for this reason the entire Japanese Civilian and Schools, 97B and 99B phases of the contracts, were absolutely illegal.

Collier's "Outline of Procedure for Opening a Branch in Tokyo, Japan" dated April 1, 1960, was introduced in evidence as Plaintiff's Exhibit 9 in Evidence. One of the purposes of the said Outline was to supplement the contract of April 15, 1960, in certain areas where the said contract cannot be more explicit because if expressed more fully in the contract, the contract would on its face flagrantly violate the Japanese Foreign Exchange and Foreign Trade Control Law. For Military sales this Outline expressly provided that the U. S. Dollars sales in Japan must be collected in Tokyo and Gates shall directly send out of Japan said U. S. Dollars collected to Colliers at New York. This method of collection was followed up to April 1st, 1962. Following April 1st, 1962, the purchasers (Military) remitted direct to New York. Gates received his 34% commission on military sales in U. S. Dollars by drawing on an "imprest fund" checking account entitled "P. F. Collier Inc., Japan Branch, Tokyo, Japan" established and funded by Colliers with the Long Island Trust Co., Garden City Park, L. I., New York. (Plaintiff's Exhibit 109 in Evidence) It was submitted in the court below that this unlicensed outflow of U. S. Dollars from Japan plus illegal payments to Gates (an exchange resident) of U. S. Dollars made the 96B (U. S. Military) portion of the contract illegal under the abovementioned Japanese Foreign Exchange and Foreign Trade Control Law. The Japan-United States Treaty of June 22nd, 1960, did not validate any of the foregoing wrongs. Article XIX of said Treaty permitted Military personnel and civilian components to ship out U. S. Dollars but it did not permit U. S. corpora-

tion doing business in Japan like Colliers to send out U. S. Dollars without specific license. *The said Japanese law also prohibited contracts for services involving payment, settlement or any other transaction governed by the provisions of the law unless approved by the Japanese Government. Neither the contract of April, 1960, nor that of September, 1961, were approved.* (Tr. 987) Petitioner claims that the contracts violated said Exchange law in another material respect relating to exportation "book orders" as more fully elaborated in the argument to follow.

Documentary proof Plaintiff's Exhibit 13 in Evidence showed mathematically the division of the $269.50 (unit price per set) in Gates' rights and Collier's rights was as follows:

Gates Rights (59.5%)			
34%	.....	$84.83	
7%	.....	17.47	
5%	.....	12.50	
12.5%	.....	33.69	
1%	.....	2.70	$151.19
Colliers Rights (40.5%)			
40.5%	.....	$118.31	118.31
Total 100%		Total	$269.50

The $172.00 remitted to New York per set under the Japanese Import license was made up (Tr. 285) of the following:

Colliers' Rights

40.5%	$118.00

Gates' Rights

12.5%	34.00
7%	17.00
1%	1.00
Total	$172.00

Therefore relative to sales to Japanese Civilians, out of each sale of $269.50, after deducting $84.83 as the 34% commission due Gates and further deducting $172.50, the remittance requirement, there remained only $12.17. If Gates gave a 5% discount of $12.50 to the customer nothing remained in his hands. Therefore the remittance, necessarily included Gates' 12.5%, 7% and 1% commissions. These remittances of $172.50 per set were not earmarked. Instead, the remittance requirement in the invoices and licenses was for example on a shipment of hundred sets: "Full amount of invoice covering cost of books, payable in U. S. Dollars in twelve (12) equal monthly installments, starting 30 days from the time this shipment of books has cleared through customs into Japan". (Tr. 250) And so the total of monthly remittances sent, ran from $6,000.00 to $18,000.00. (Rec. 139-146) Gates did not at any time default in any of these requirements and sent from Tokyo to New York a total of $210,000. (Rec. 139-146)

With relation to the alleged charges by Collier of embezzlement by Gates under the 97B Japanese Civilian accounts, the basis of Collier's claim is Exhibits B-13 A, B and C which Collier claimed showed that certain alleged C.O.D. Japanese yen sales in Japan to Japanese Civilians were reported as term sales. *The Japanese Statute on embezzlement was not introduced in evidence by Colliers.*

There was no proof as to what was the substantive Japanese law of conversion, stealing, fraud or deceit, applicable to the situation or circumstances in this case. *The record was abundant with proof of debit and credit between Colliers and Gates.* (Tr. 149) Colliers owed Gates and Gates owed Colliers large sums of money. Colliers conceded that where there was a term sale, even when there was only a yen equivalent of $10.00 as down payment, there became due immediately to Gates the 34% commission of $84.83 less however the $10.00 received or $74.83. (Tr. 89-90) Colliers owed this amount to Gates on each of these term sales made in Tokyo, Japan. There were 1404 term Japanese yen sales (Rec. 30) (2449– 1095= 1404) or a total of $119,-101.32 (84.83 X 1404) was involved. Collier was in no position to pay this large sum to Gates except by following the Outline above mentioned and making payment to sales people as follows: *"After the Tokyo Bank Account has sufficient yen deposits, the sales people paid on yen accounts will be paid in yen from this account"*. After meeting the monthly remittance requirements Gates did what he was authorized to do in writing. He did not follow Exhibits B-13 A, B and C in his operations in Tokyo but followed Collier's "Outline of Procedure for Opening a Branch in Tokyo, Japan" and the directions as to remittances in Collier's invoices and Import licenses. Gates contended in the court below that under such circumstances there was no fraud or embezzlement. Primarily, since Colliers didn't prove the Japanese Law in relation thereto and further because there could be no fraud where Gates handled the money as he was ordered to do. He had a general power of attorney from Colliers for his Tokyo operations. Plaintiff's Exhibit 82 in Evidence.

Gates claimed commissions due him, as follows:

Account	Due to Gates
97B & 99B	$ 81,339 (J. Civilians & School)
96B	153,448 (Military)
98B	188,017 (Australia)
	$422,804

Gates claimed gross sales of $1,810,262 on figures admitted by Colliers. By charts Gates showed that the above commissions of $422,804.06 are still due him. The charts are repeated in the argument to follow.

7. REASONS FOR GRANTING WRIT

There are several reasons why this Court should grant certiorari in this case. Petitioner submits that this case is not only an unusual international case but the following reasons are "special and important."

A. The accepted and usual course of judicial proceedings for a Court of Appeals is to examine the opinion of the District Court so that there is no oversight or obvious mistake in the District Court's decision. When an obvious mistake is made by the District Court and the Circuit Court also permits such mistake to continue, this Court must exercise its supervision over the lower courts. There was involved in this case an unusual statute of Japan, the Foreign Exchange and Foreign Trade Control Law and the Courts below were not familiar with them. The following flagrant and obvious mistake occurred. The Court of Appeals of the Ninth Circuit by affirming and agreeing with the District Court's finding that a sudden overnight raising from $69.00 to $172.50 on or about April 15, 1960, of the licensed exportable U. S. Dollar amount from Tokyo

to New York under Japanese licenses on the sale at $269.50 in Japan of 1 set of encyclopedia was explainable because the $172.50 included Gates' following "contingent *per cent*" commissions:

12.5%	$34.00
7.0%	17.00
1.0%	3.00
Total	$54.00

was a finding that the $172.50 included the "*transfer*" to the United States of "*claimable assets*" of Gates to be settled and liquidated by Collier Corporation in New York (*exchange non-resident*) and Gates (*exchange resident*) upon the happening of the following contingencies:

12.5%—Upon the showing of no loss in excess of 12.5% in term sales.

7.0%—Upon the showing 50% collection of sales amount in 15 months.

1.0%—When sales exceeded half a million.

That such a finding is in effect a direct finding that the entire arrangement was illegal under the Japanese Foreign Exchange and Foreign Trade Law in that Article 30 thereof provides:

> "Article 30. No person may be a part to a creation, modification, liquidation, settlement or direct or indirect transfer of the following items or to any other transaction of the same, unless authorized as provided for by Cabinet Order;
>
> "3) Claimable assets between an exchange resident and an exchange non-resident."

In other words the trial and Appellate Courts found that the transaction contemplated, under the contracts, as found by the District Court and actually carried out, was ab-

solutely illegal on the face of the Japanese law. The Courts below apparently didn't understand the Japanese law and without being aware of the full meaning of said Article 30 made fact findings which on the face violated said law. Article 30 was quoted at the bottom of page 17 of opening brief of petitioner in the Court of Appeals and the fact that claimable assets were involved clearly pointed out.

B. That the Court of Appeals of the Ninth Circuit again so far departed from the accepted and usual course of judicial proceedings and so far sanctioned such a departure by the United States District Court, that petitioner again prays for an exercise of this Court's supervision on ground that both Courts arbitrarily refused to rule on the following material issues raised by petitioner. Petitioner clearly raised orally and in writing in the District Court and in the Court of Appeals these very important but obvious issues but no decision nor ruling were made by either Court.

a) Petitioner contended in the Courts below that the contracts of April, 1960 and September, 1961, were service contracts and since these contracted services *"involved payment settlement or any other transaction governed by the provisions of this law (Japanese Foreign Exchange and Foreign Trade Control Law—Plaintiff's Exhibit 98)"* both contracts should have been authorized by the Japanese Government. No such authorization was received. (Tr. 987) Therefore the contracts were in violation of Articles 42, 43 and 44 of said Japanese Foreign Exchange Law.

b) Petitioner contended in the Courts below that the contracts of April, 1960 and September, 1961, contemplated sending out of Tokyo to New York the Yen book orders from Japanese civilian purchasers so that Collier may borrow on said orders from its New York banks; that under

Article 45 of said Japanese Foreign Exchange and Foreign Trade Control Law which reads as follows:

> "Article 45. Unless authorized as provided for by cabinet order, no person may export or import means of payment, precious metals, securities or documents embodying rights to claimable assets."

these yen book orders were clearly "documents embodying rights to claimable assets". The evidence was undisputed that the petitioner and respondent provided and contemplated that these yen book orders were to be sent out from Tokyo to New York without Japanese Government authorization. They actually mailed the orders out from Tokyo to New York without said authorization and violated said Article 45 every time they did it. Therefore said contracts were in violation of Article 45.

c) Petitioner contended in the Courts below that the contracts of April, 1960 and September, 1961, contemplated Colliers making payments of U. S. Dollars to Gates in New York for Gates' services in Tokyo. Gates lived in Tokyo while these payments took place. An "imprest fund" was created by Colliers at the Long Island Trust Co., Garden City Park, L. I., N. Y., to make these payments and payments were made from Collier to Gates, all contrary to Articles 27, 28, 29 and 30 of said Japanese Foreign Exchange Law. These sections absolutely prohibited such payments "abroad" to Gates unless licensed.

That the Trial Court and the Court of Appeals absolutely disregarded these issues presented and did not even discuss them in their respective opinions. Petitioner virtually did not have a day in Court with relation to these issues. The Trial Court was so bent to uphold the contracts of April, 1960 and September, 1961, that it disregarded these very obvious and material issues presented. Respondent's admissions with relation to these issues made the

contracts of April, 1960 and September, 1961, obviously illegal on the grounds stated in (a), (b) and (c) above.

C. That the Court of Appeals of the Ninth Circuit erroneously interpreted and applied Article XIX of Treaty between Japan and the United States (effective June 22nd, 1960). This obvious error should be forthwith corrected by this Court.

a) The Appellate Court, to conveniently apply said Article XIX, erroneously found that "During the operation of the contract, United States Armed Forces personnel in Japan were billed directly for books received by them *and payment was made in dollars direct to New York.*" The agreed and undisputed facts below in the Trial Court and the Trial Court's findings were that up to April 1st, 1962, the billing to military purchasers was from Colliers' Tokyo office and payments by military purchasers were direct to Colliers' Tokyo office. Colliers' Tokyo office then sent such dollars to its New York office. Therefore between June 22nd, 1960 to April 1st, 1962, all dollar collections from Military personnel stationed in Japan by the Colliers' Tokyo office remitted by said Colliers' Tokyo office to New York were flagrantly illegal. The treaty only allowed direct shipments of United States Dollars out of Japan by *"members of the United States Armed Forces and the civilian component"* and establishments like the Tokyo office of Colliers were not allowed shipments of dollar amounts outside of Japan unless licensed. The treaty further provided that United States authorities shall take suitable measures to preclude *"circumvention of the Japanese Foreign Exchange Controls"* so the Court of Appeals should have condemned the circumvention schemed by the Collier's Tokyo office and held the circumvention illegal.

D. That the Court of Appeals of the Ninth Circuit rendered a decision which materially departs from the de-

cisions of many other Courts of Appeals and this Supreme Court on the following questions involving conflicts of law:

1) That the general conflicts rule is that matters relating to the performance of a contract are regulated by the law of the place of performance. The Court of Appeals repudiated this well recognized rule. The evidence was unequivocal that the place of performance was in Japan.

2) That the general conflicts rule is that in a case of an alleged tort (embezzlement or conversion of funds) committed in Japan but sued upon in the United States District Court of Hawaii, the law of Japan where the tort was committed applies. The Court of Appeals repudiated this well recognized rule. The evidence was unequivocal that the alleged embezzlement or conversion if any took place in Tokyo, petitioner's place of business.

3) That the Court of Appeals, erred in applying the "center of gravity" or "grouping of contracts" theory of conflicts of law and holding that New York was the center of gravity in that the center of gravity and activity under the facts in this case was clearly in Tokyo, Japan. Other Courts of Appeals under similar fact situations have so held.

E. That the Court of Appeals completely disregarded the rule that "a judgment of a sister state cannot be challenged on ground that it was obtained by false testimony or perjury", with relations to an order of the Tokyo District Court. This raises an important question of law which this Court should review immediately. Orders of Courts of other foreign jurisdictions should not be easily overturned. General comity, utility and convenience of nations require that orders and judgments of Japanese Courts be given full effect like those of sister states.

F. That the Court of Appeals completely disregarded the rule relating to denial of attorney's fee decided by

this Court in *Fleischmann Distilling Corporation* v. *Maier Brewing Co.*, ... U.S. ....., 87 S. Ct. 1404 (Decided May 8th, 1967). The ruling allowing attorney's fees by the Court of Appeals is contrary to the above decision of this Court.

G. That this case involves issues of foreign currency controls. Foreign currency controls bear importantly on the conduct of this country's foreign relations. We should not permit our businessmen in foreign countries to violate their foreign currency laws. Ill considered or obvious mistakes in interpretation of foreign currency control laws prejudicial to foreign countries involved should be corrected by this Court. This Court in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 84 S. Ct. 923, specially commented in allowing certiorari where foreign relations will be probably affected by erroneous and mistaken interpretations of foreign laws and decrees by the lower Federal Courts of the United States.

H. That the writ should be allowed for the other material errors heretofore listed in "3) Questions Presented and How Raised" not covered in A to G above.

8. ARGUMENT

I

The April, 1960 and September, 1961, Gates-Collier Contracts Were Flagrant Violations of the Foreign Exchange and Foreign Trade Control Law of Japan.

The contracts of April, 1960, Plaintiff's Exhibit 1, and September, 1961, Plaintiff's Exhibit 2, were plain violations of the Japanese Foreign Exchange and Foreign Trade Control Law of Japan. The official English translation of the law is in evidence in this case. (Plaintiff's Exhibit No. 98 in Evidence)

The said contracts were violations because of the several major violations hereinafter discussed. *From their inception the contracts were planned and schemed to violate the said Japanese Foreign Exchange and Foreign Trade Control Laws*; the evidence is unequivocal that these violations were with knowledge and contemplated by Colliers and Gates.

The purpose of said Japanese Foreign Exchange Law is stated as follows:

> "Article 1. The purpose of this Law is to provide for the control of foreign exchange, foreign trade and other foreign transactions, necessary for the proper development of foreign trade and *for the safeguarding of the balance of international payments and the stability of the currency, as well as the most economic and beneficial use of foreign currency funds, for the sake of the rehabilitation and the expansion of the national economy.*" (Plaintiff's Exhibit 98 in Evidence, page AA1) (Emphasis ours).

The Trial Court and the Court of Appeals, it seems, thought that this Japan law concerns only the outflow of funds from Japan but the statute is much more comprehensive. *It guides and controls inflow of funds to Japan as well, controlling "exchange residents" like Gates in the receipt of funds in the United States.* It is obvious that such controls are necessary to safeguard Japan's balance of international payments. The privilege of doing business in Tokyo carries with it an obligation to conserve Japan's balance of international payments.

Violations of the said Japanese Foreign Exchange Laws are subject to "penal servitude not exceeding three years" or to fine not exceeding 300,000 yen or both. (Plaintiff's Exhibit 98 in Evidence, pages AA16-17)

The Trial Court and the Court of Appeals with relation to the argument that the contracts of April, 1960 and September, 1961, violated said Japanese Foreign Exchange Law in a rather summary manner found and concluded that they were not illegal. (Rec. 639-642)

It is submitted that the Trial Court and the Court of Appeals, erred in the above findings and conclusions in that the contracts of April, 1960 and September, 1961 (Plaintiff's Exhibits 1 and 2 in Evidence), were illegal for the following obvious reasons:

A.—The Japanese Civilian (97B) Portion of Contract Was Absolutely Illegal under the Japanese Foreign Exchange Laws.

It is submitted that the Japanese Civilian (97B) portion of the Contract was illegal under the Japanese Foreign Exchange Laws.

Under Articles 27, 28, 29 and 30 of said Japanese Foreign Exchange Laws (Plaintiff's Exhibit 98, pages AA8-9) it is provided under the title "Restriction and Prohibition of payment", as shown in footnote below.[2] And "exchange residents", "exchange non-residents" and

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2—"Article 27. Unless authorized as provided for in this Law or in Cabinet Order, no person shall in Japan:

(1) Make any payment to a foreign country;

(2) Make any payment to an exchange non-resident or receive any payment from an exchange non-resident;

(3) Make any payment to an exchange resident on behalf of an exchange non-resident or receive such payment;

(4) Place any sum to the credit of an exchange non-resident or receive any sum for credit from an exchange non-resident." (Plaintiff's Exhibit 98, page AA8)

"Article 28. Unless authorized as provided for in this Law or in Cabinet Order, no person shall in Japan and no exchange resident shall abroad make any payment to or for

"claimable assets" are defined (Exhibit 98, pages AA2-AA3) as shown in footnote below.[3]

Colliers obtained after April 15, 1960, under said law import licenses (Tr. 97, 100) and for each imported encyclopedia set with accompanying books, Colliers was licensed to remit $172.50 out of Japan. (Tr. 280) Before said April 15, 1960, the amount licensed to be remitted was only $69.00. It is submitted that Colliers after April 15, 1960, in its invoices and application to remit funds padded and included in the $172.50, sums, including Gates "contingent percentage" commissions, illegal to remit and violated Articles 27, 28, 29 and 30 of said Foreign Exchange Law.

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the credit of an exchange resident as a consideration or association with payment or other benefit accruing to anyone abroad or acquisition of property abroad."

"Article 29. Unless authorized as provided for in this Law or in Cabinet Order, no person shall in Japan and no exchange resident shall abroad receive any payment from or on behalf of an exchange resident as a consideration or association with surrender of any value abroad."

"Article 30. No person may be a part to creation, modification, liquidation, settlement or direct or indirect transfer of the following items or to any other transaction of the same, unless authorized as provided for by Cabinet Order;

(1) Claimable assets expressed in National currency between exchange non-residents;

(2) Foreign claimable assets between exchange residents;

(3) Claimable assets between an exchange resident and an exchange non-resident."

3—"Article 6. In order to make uniform the application of this Law and orders issued in accordance therewith the following terminology shall be defined to mean:

(5) 'Exchange residents' shall mean all natural persons who have their permanent place of abode or who customarily live in Japan, and also juridical persons (corporate bodies, enterprises), having their seat or place of administration in Japan. The branches in Japan (agencies, establishments, etc.) of exchange non-residents are considered to be exchange residents

Documentary proof, Plaintiff's Exhibit 13 in Evidence, showed mathematically how the Tokyo retail sale price of $269.50 (Yen converted into Dollars) per set was split. It showed the following:

Gates rights (59.5%)			
34%	.....	$84.83	
7%	.....	17.47	
5%	.....	12.50	
12.5%	.....	33.69	
1%	.....	2.70	$151.19
Colliers rights (40.5%)			
40.5%	.....	118.31	118.31
Total 100%		Total	$269.50

These figures are based on percentages recited in the contracts of April, 1960 and September, 1961. This was plain arithmetic based on the contract so Colliers was in no position to deny these figures. Collier's right was only $118.31. If so why was $172.00 sent out of Tokyo? Gates testified (Tr. 285) that the $172.00 was made up of the following percentages in round figures:

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irrespective of whether they are independent in law or not and even if the place of their administration or their headquarters is located abroad.

(6) 'Exchange non-residents' shall mean all persons, natural or juridical, other than those falling under the meaning of exchange residents.

(13) 'Claimable assets' shall mean time deposits, demand deposits, insurance policies and claims, balances in current account, any claims to be paid such as arising out of loans or bids or any other claims, expressed in terms of money insofar as they are not embodied within the meaning of other items of this Article."

Colliers Rights		
40.5%	$118.00	$118.00
Gates Rights		
12.5%	34.00	
7%	17.00	
1%	3.00	54.00
	Total	$172.00

Gates' testimony is corroborated not only by the very fact that the figures based on the contract percentages add exactly to $172.00 but by the very findings of the Trial Court.

The Trial Court with reference to the $172.00 found that certain "contingent percent" commissions of Gates were in the $172.00 and its entire analysis of "Collier's true cost" is based on the inclusion of these contingent commissions of Gates. The Trial Court stated:

> "The only figure which the court can assume as representing Gates' share on every sale was 34%. Gates was entitled to the 7% only when 50% of the purchase price had been paid within 15 months after the order. The 5% was to be paid Gates only for cash sales. The 12.5% was contingent upon the collection loss ratio being less that figure, and the 1% was based upon a certain volume of sales. *Thus, every other percentage save the initial sales commission of 34% was a 'contingent percent.'*" (Emphasis ours) 256 F. Supp. at page 212.

That the Court of Appeals of the Ninth Circuit by affirming and agreeing with the District Court's said finding that a sudden overnight raising from $69.00 to $172.50 on or about April 15, 1960, of the licensed exportable U. S. Dollar amount from Tokyo to New York under Japanese licenses on the sale at $269.50 in Japan of 1 set of en-

cyclopedia was explainable because the $172.50 included Gates' following "*contingent per cent*" commissions:

12.5%	$34.00
7.0%	17.00
1.0%	3.00
Total	$54.00

was finding that the $172.50 included the "*transfer*" to the United States of "*claimable assets*" of Gates to be settled and liquidated by Collier Corporation in New York (exchange non-resident) and Gates (exchange resident) upon the happening of the following contingencies:

12.5%—Upon the showing of no loss in excess of 12.5% in term sales.

7.0%—Upon the showing 50% collection of sales amount in 15 months.

1.0%—When sales exceeded half a million.

It is submitted that such a finding is a direct finding that the entire arrangement was illegal under the Japanese Foreign Exchange and Foreign Trade Law in that Article 30 thereof provides:

> "Article 30. No person may be a part to a creation, modification, liquidation, settlement or direct or indirect transfer of the following items or to any other transaction of the same, unless authorized as provided for by Cabinet Order;
>
> "3) Claimable assets between an exchange resident and an exchange non-resident."

In other words the trial and appellate courts found that the transaction contemplated as found by the District Court and actually carried out was absolutely illegal on the face of the Japanese law. The courts below apparently didn't read the Japanese law carefully but with-

out being aware of the full meaning of said Article 30 made fact findings which on the face violated said article. Article 30 was quoted at the bottom of page 17, opening brief of petitioner.

Furthermore with relation to these "contingent percent commissions" Collier's counsel admitted that Colliers of New York paid Gates within the United States in or about the latter half of 1961 the sum of $18,834.24 (U. S. Dollars) on account of the 12½% commission due. (Tr. 385-387) Gates (an exchange resident) did not have a Japanese license to receive such payments. See also Plaintiff's Exhibit 93 in Evidence confirming the above illegal payments. Plaintiff's Exhibit 75 shows 7% bonus payments of $262.05 and $23,357.49. All of these were clear violations of Articles 27, 28, 29 and 30 above recited. If businessmen in Tokyo can so freely receive U. S. Dollars in the United States, Japan's balance of international payments will be imbalanced easily. The provisions of the law requiring a license to receive such payments by "exchange residents" such as Gates was to make *"the most economic and beneficial use of foreign currency funds (U. S. Dollars in this case) for the sake of rehabilitation and expansion of (Japan's) national economy."* These controls of inflow funds are absolutely necessary for a country trying to reestablish itself.

Gates' testimony and the above quoted Trial Court's finding that Gates' "contingent percent" commissions were included in the $172.50 are further corroborated by the fact that Collier in its vouchers to Tokyo of different dates in order to keep the padded figure of $172.50 constant varied the values of accessory books. For example Plaintiff's Exhibit 26 in Evidence dated July 28, 1960, listed the books as follows:

Cyclopedia (Fab.)	$153.00
Atlas	9.50
Dictionary	5.00
Home Repair Book	5.00
	$172.50

But in Plaintiff's Exhibit 83 in Evidence at pages 2, 3, 4, dated June 19, 1961, November 8, 1961 and April 14, 1961, the unit price on the same Atlas and Dictionary are quoted as follows:

Cyclopedia (Sturdite)	$155.50
Atlas	10.75
Dictionary	6.25
	$172.50

The foregoing glaring discrepancy in the values of the accessory books shows that to Colliers it was more important to obtain the constant figure $172.50 because it also included Gates' contingent percent commissions and the values of the accessory books were varied to carry out the illegal scheme.

Therefore taking the Trial Court's own opinion with relation to Gates' "contingent percent" above quoted, affirmed by the Court of Appeals by specific reference and the admitted payments by Collier New York to Gates of $18,834.24, $262.05 and $23,357.49 of these "contingent percent" commissions made the 97B operation (Japanese Civilian) violently illegal. Article 30 could not have been more violently violated and the Trial Court in effect so found by its fact findings.

B.—The U.S. Military 96B Portion of the Contract Was Illegal under the Japanese Foreign Exchange Laws.

The contracts of April, 1960 and September, 1961, also covered sales to Military personnel under 96B accounts. The "Outline of Procedure for Opening Toyko Branch" Plaintiff's Exhibit 9 in Evidence clearly covered Dollar Sales as well as yen sales. (Tr. 81) Paragraph 5(e), page 2, differentiates the two and the Dollar Sales were supplied with an "imprest fund" at the Long Island Trust Co., Garden City Park, L. I., N. Y., on which Gates had the power of attorney to draw to pay commissions due him on these Dollar Sales. (Tr. 90)

The documentary evidence in this case, Plaintiff's Exhibits 109 and 110 in Evidence, shows that "P. F. Collier Inc., Japan Branch, Tokyo, Japan" had a checking account funded by Collier in New York (clearly an exchange non resident) at said Long Island Trust Co., Long Island, New York and checks were drawn on said account from Tokyo by Gates (person in Japan and exchange resident) and said Exhibit 110 shows that the checks drawn by Gates were deposited at the First National City Bank of New York, Wells Fargo Bank of San Francisco and the Chemical Bank of New York. The endorsements clearly show this. The funds for the imprest fund at Long Island were supplied and funded by Colliers of New York. This arrangement violently violated Articles 27, 29 and especially Article 30(2) which prohibited creation of foreign claimable assets between Collier Tokyo branch office (exchange resident) and Gates (exchange resident).

Based on Plaintiff's Exhibit 75 in Evidence, a document prepared by Colliers as Evidence and presented to the Tokyo District Court, the total amount remitted in this manner from April, 1960 to May 1, 1960, amounted to:

$ 97,452.00
348,082.40 (Tr. 892, modified by stipulation)

$445,534.40

The 34% commission paid to Gates according to said Exhibit 75 was:

$ 31,342.77
90,313.63

$121,656.40

And the total 7% commission paid to Gates was:

$ 86.78
9,731.33

$9,818.11

These sums were not insignificant. Foreign claimable assets created, liquidated and settled in this illegal way left a large hole in Japan's attempt to control its international balance of payments. It is submitted that the 96B (Military) portion of the contracts were clear violations of the Japanese Foreign Exchange Laws based only on the foregoing argument.

It is submitted that the 96B (Military) arrangement was also illegal because Colliers Tokyo sent U. S. Dollars via mail to Colliers New York. The Court of Appeals made the following obviously erroneous finding:

> "During the operation of the contract, United States Armed Forces personnel in Japan were billed directly for books received by them *and payment was made in dollars direct to New York.* No Japanese permits for these payments were obtained." (page 3 of opinion of Court of Appeals) (Emphasis ours)

The Court of Appeals erred in finding that the payment was made direct to New York by the United States Armed

Forces personnel in that the evidence below was uncontradicted, that up to April 1st, 1962, Collier Tokyo collected these Dollar payments from military personnel and Collier Tokyo sent said dollars to Tokyo. The Trial Court so found:

> "By March 1, 1962, however, Gates term sales out of Japan had resulted in such poor collections that Colliers ordered, and Gates in writing agreed—all collections on 96B (military) accounts would be made by Collier in New York instead of from Tokyo. Collier in New York was immediately to prepare and by April 1st, 1962, send out collection letters so that every subscriber of the 96B accounts would receive a notice of charges". 256 F. Supp. 208.

The Court of Appeals found that the sending of these U. S. Dollars were legal because of the following language of the treaty between Japan and the United States (effective June 22nd, 1960):

ARTICLE XIX

> 1. Members of the United States armed forces, the civilian component and their dependents, shall be subject to the foreign exchange controls of the government of Japan.
>
> 2. The preceding paragraph shall not be construed to preclude transmission into or outside of Japan of the United States dollars or dollar instruments representing the official funds of the United States or realized as a result of service or employment in connection with this agreement *by members of the United States Armed Forces and the civilian component*, or realized by such persons and their dependents from sources outside of Japan.
>
> 3. The United States authorities shall take suitable measures to preclude the abuse of the privileges stipulated in the preceding paragraph or circumvention of the Japanese foreign exchange controls.

It is submitted that the remittance would have been legal if sent direct by military personnel themselves but as above indicated the payments by the military were made to Collier's Tokyo office. It was Colliers Tokyo office who remitted the Dollars to Colliers New York. Article XIX above quoted did not at anytime permit Colliers Tokyo office to send out U. S. Dollars out of Tokyo. In fact Article XIX makes it clear that the privilege is only for members of the Armed Forces and that United States authorities should take suitable measures to preclude the abuse of the privileges stipulated or circumvention of the Japanese foreign exchange controls.

It may be argued that since the military personnel may have sent $269.50 direct to Collier's New York why couldn't Collier's Tokyo have done the same? First of all the import license allowed under the 97B accounts (Japanese Civilian) for the same books allowed a remittance of only $172.50. Why would Colliers Tokyo be allowed to remit $269.50 for the 96B account when the license limited it to $175.50 on the 97B account (Japanese Civilians) for the same books?

Therefore Article 27 which unless authorized prohibits "a person in Japan" (Gates) I. "to make any payment to a foreign country" (United States) or II. "to make any payment to an exchange non resident" (Colliers-New York) were clearly violated. The Court of Appeals found that "No Japanese permits for these payments were obtained".

For the foregoing multiple reasons the military 96B portion of the contracts was clearly illegal.

C.—Contracts of April, 1960 and September, 1961, Were Service Contracts Which Required Prior Approval.

Under Sections 42, 43 and 44 of the Japanese Foreign Exchange Laws, the contracts of April, 1960 and September, 1961, were required to be approved by the Minister of Finance. Sections 42, 43 and 44 of Plaintiff's Exhibit 98 in Evidence are quoted in the footnote below.[4]

This point was repeatedly raised before the Trial Court and on page 24 of Petitioner's Opening Brief filed in the Court of Appeals. The purpose why the Japanese government requires service contracts *"involving payment, settlement or any other transaction governed by the provisions of this law (Foreign Exchange law)"* is obvious. Otherwise under the guise of services, one may make large payments out of Japan, and deplete Japan's balance of international payments. The contracts of April, 1960, and September, 1961, were never approved by the Japanese government. Had the contracts been sent to the Japanese government for approval, Gates and Colliers Tokyo would have been questioned regarding the method of payment of the "contingent percentages" (Trial Court's terminology)—that is to say the following:

4—"Article 42. Unless authorized as provided for by Cabinet Order, no person shall contract for services *involving payment, settlement or any other transaction governed by the provisions of this law.*"

"Article 43. Unless authorized as provided for by Cabinet Order, no exchange resident shall render services to an exchange non-resident unless an adequate payment is provided in accordance with the provisions of this Law."

"Article 44. Any person or exchange non-resident as specified in the preceding two Articles may be required to obtain prior approval from or present certification of adequate payment to the competent Minister as provided for by Cabinet Order"

12.5%	$34.00
7%	17.00
1%	3.00

Assuming that Gates and Colliers Tokyo were to disclose the truth—that these sums were included in the $172.50 import license, Colliers Tokyo's import license of $172.50 per set of books would have been immediately cancelled for fraud and padding in its application. This whole case and grand fraud on the Japanese government would have been disclosed at an early stage and the difficulties in this case would have never risen.

At any rate, the very purpose of the section requiring service contracts involving payment governed by the exchange law, was to control the very irregularities and illegalities which have arisen in this case.

The point raised herein is a simple one but it proves conclusively that the whole contract was illegal, both the 97B (Japanese Civilian) and 96B (Military personnel). Why the Trial Court and the Court of Appeals were reluctant in entertaining this simple point to dispose the question of illegality of the contracts raised in this case is difficult to comprehend. The point was raised in writing before both Courts.

It is a serious matter for any Trial Court or Appellate Court to evade a material question raised by a party and reach a result opposite to that which would have necessarily resulted had the question been taken up. This Court's supervisory power should be forthwith used to correct this type of obvious injustice.

D.—Illegal to Send Book Orders from Tokyo to New York.

The next violation was the sending out of Tokyo to New York the Yen or U. S. Dollar book orders so that

Collier may borrow on said orders from its New York banks. Under Article 45 of said Foreign Currency Control Law which reads as follows:

> "Article 45. Unless authorized as provided for by Cabinet Order, no person may export or import means of payment, precious metals, securities, or documents embodying rights to claimable assets."

these yen book orders and military book orders exported were clearly "documents embodying rights to claimable assets". The Trial Court in fact found that these orders were sent to New York as follows:

> "Orders obtained by Gates and his sales personnel were to be forwarded to Collier in New York for acceptance by Collier, there." 256 F. Supp. 206.

In fact, Colliers New York requested Colliers Tokyo in writing that the original copy be sent to New York. (Tr. 985) (Plaintiff's Exhibit 126 in Evidence)

Article XIX of the United States-Japan Treaty effective June 22nd, 1960 did not permit the sending from Japan to the United States of "documents embodying rights to claimable assets" by military personnel. Furthermore, here again, it was Colliers Tokyo who sent the documents.

This point was also raised in the Court below and in the Court of Appeals. This was an admitted violation of an illegal act. Both Courts refused to rule on this obvious point—it is difficult to see why. Petitioner asks that the supervisory power of this Court be used to reverse the approval of legality by silence. This point in itself made the entire scheme illegal.

. . . . .

Therefore it is submitted that when the contract of April 15, 1960, was entered into, it followed an illegal scheme and plan dated April 1, 1960, entitled "Procedure

for Opening Tokyo Branch Office" printed and distributed by Collier, on the fly leaf of which appears the signature of S. J. Nork, a Collier officer. The September, 1961, contract was an exact reproduction of the April, 1960, contract and every element of illegality of the April, 1960, contract was carried into the September, 1961, contract. It is submitted that as above shown the parties to the contract contemplated, planned and schemed to violate the Japanese Foreign Exchange Laws. The plans contemplated illegal violations of the Japanese Foreign Exchange Laws.

II

Effect of Illegality of Contracts of April, 1960 and September, 1961.

The next question is the effect of the illegality argued in foregoing Paragraphs I A, B, C and D of this brief. It is submitted:

1) That the contracts were illegal under the Japanese laws and,

2) That the contracts were illegal under the New York laws.

In 17 Am. Jur. 2d 507, the writer regarding illegal contracts violating the laws of another country states as follows:

> "Moreover, it is said to be well settled that if a contract *is entered into with the view of violating the laws of another country it is unenforceable,* even though it does not contravene the law of the place where it is made or the law of the forum." (Emphasis ours)

The same rule was followed in *Butkin* v. *Reinfeld,* (1956) (C.C.A. 2, N.Y.) 229 F. 2d 215, Cert. Den. 325 U.S. 844, 77 S. Ct. 50, where the Court stated:

"The trial judge further argued that since the L. L. & B. transaction took place in Canada the prohibition laws of the United States did not render it illegal. *But it now seems well settled that if a contract is entered into with a view of violating the laws of another country it is unenforceable even though it does not otherwise contravene the law of the place where it is made or of the forum.* 6 Williston on Contracts, § 1749 (rev. ed. 1938); Restatement of Contracts, § 592; Graves v. Johnson, 1892, 156 Mass. 211, 30 N.E. 818, 15 L.R.A. 834, Holmes, J. This appears to be the law of Canada as well. Walkerville Brewing Co. v. Mayrand, (1928) 4 Dom. L.R. 500, noted in 42 Harv. L. Rev. 436."

See also *Hesslein* v. *Matzner*, (1940) 19 N.Y.S. 2d 402.

Therefore the contracts were illegal both under the Japanese Law as well as the New York Law. Colliers in the Court below, as well as in the Court of Appeals, was not able to answer the thrust of this argument.

III

Count I of Petitioner's Complaint in Quantum Meruit Permits Recovery Where Alleged Wrong Is Malum Prohibitum.

Count I of petitioner's complaint is a quantum meruit count. The enrichment was and is in New York where monies were sent by appellant and received by Colliers.

It is well settled in conflicts of laws, Section 453, Restatement of the Law of Contracts, that:

"When a person is alleged to have been unjustly enriched, the law of the place of enrichment determines whether he is under a duty to repay the amount by which he has been enriched."

Defendant admitted that such is the law in the lower court. (Tr. 471)

The leading case in New York State on this subject is *John E. Rosasco Creameries* v. *Cohn*, 276 N.Y. 274, 11 N.E. 2d 908, 118 A.L.R. 644, wherein it is stated:

> "Illegal contracts are generally unenforcible. *Where contracts which violate statutory provisions are merely malum prohibitum, the general rule does not always apply.* If the statute does not provide expressly that its violation will deprive the parties of their right to sue on the contract, and the denial of relief is wholly out of proportion to the requirements of public policy or appropriate individual punishment, the right to recover will not be denied. See Williston on Contracts, Vol. 3, Sec. 1789; Vol. 5 (2d Ed.) Sec. 1630. Cf. American Law Institute, Restatement of the Law of Contracts, Secs. 548, 600."

See also: *Application of Kamerman*, (1960) C.C.A. 2 N.Y., 278 F. 2d 411; *Watkins* v. *Sedberry*, (1923) 261 U.S. 571, 43 S. Ct. 411; *Re Joslyn*, (C.C.A. 7) 223 F. 2d 184.

See Annotation, Recovery for Legal Services in Quantum Meruit under a contract which is void as against Public Policy, 100 A.L.R. 2d 1378.

It is submitted that violations of the Japanese Foreign Exchange Laws are malum prohibitum and therefore plaintiff should be allowed recovery under his quantum meruit counts.

There is not much dispute as to the total amount of sales from April 15, 1960 to October 16, 1962. Attached hereto at the end of this brief (page A23) marked Exhibit CC is a summary of the figures admitted by Colliers to be the total of the Australian 98B, Military 96B and Japanese Schools and Civilian 99B and 97-B sales, remittances and collections. Commissions earned, commissions received and commissions due, together with proper computation to show the amounts due. (Ans. to Interrogatories

Rec. 265 to 278) Also attached are Exhibits DD (page A24) and EE (page A24) showing that Colliers is holding over their rights a total of $340,871.97.

Based on Exhibits CC, DD and EE above mentioned, Gates contends that he is entitled to the following recovery under his three quantum meruit counts:

Australia—98B.

Note, plaintiff's experience shows that 6/7 of the 36% commission is paid salesmen and used to cover expenses. Therefore 1/7 remains for plaintiff. Therefore see Exhibit CC, thus:

$ 30,065.05	(1/7 of $210,448.41)	(36% row)
40,920.52	.....	7% row
81,298.64	.....	12.5% row
6,503.89	.....	1% row
29,228.95	.....	5% row
$188,017.05	amount of suit	

Military—96B.

$159,989.89	.....	34% row
32,939.10	.....	7% row
61,496.65	.....	12.5% row
4,705.59	.....	1% row
23,527.93	.....	5% row
$282,659.16		
–129,210.48	less commission received	
$153,448.68	amount of suit	

Japan Civilians and Schools, 97B and 99B.

$110,482.89	
9,763.14	
$120,246.03	

-38,906.78 (12,426.58, acc't bal. + 26,480.20, Sales Discount)

$ 81,339.25 amount of suit

Total of 98B, 96B, 97B and 99B.

Australia 98B	$188,017.05
Military 96B	153,448.68
Japan Civilians 97B and Schools 99B	81,339.25
Plaintiff's Total Claim	$422,804.98

IV

Trial Court Erred in Finding and Concluding Embezzlement, Fraud and Criminal Breach Without Evidence of the Substantive Japanese Law on Subject.

The Trial Court was fully advised in a "Pretrial Brief on Conflicts of Laws Problems in Case," filed by counsel for Gates, on December 10, 1965 (Rec. 525-531, at 529), that:

> "Colliers bases its counterclaim and defense on various acts of plaintiff (Gates) which took place in Japan. The law is clear that the law of the place of performance applies in these cases." (Rec. 529)

Since the law on the subject was so clearly presented in an article in 50 A.L.R. 2d 254 entitled "What Law Governs in Determining Whether Facts and Circumstances Operate to Terminate, Breach, Rescind or Repudiate a Contract," appellant Gates quoted from said article (Rec. 529) as follows:

> "The general rule is that unless a contrary intention is expressed in the contract, matters connected with the performance are regulated by the law prevailing at the place of performance. Questions as to whether there is an *effective termination, breach, rescission, or repudiation of a contract have been rec-*

ognized as matters of performance within the rule stated above. Where a contract is to be performed at more than one place, the law of the place in which the specific acts complained of as a breach or termination of the contract were done or to be done is controlling. The law of the place of performance of a contract has also been held to determine questions as to whether there is an excuse for nonperformance, such as illegality or impossibility of performance, whether a contractual right has been forfeited, and whether a contractual obligation has been discharged." (Emphasis ours)

In spite of the foregoing article and all the supporting cases cited in said article, the court found as shown in footnote below.[5]

In the first place the Japanese statute on embezzlement was not introduced in evidence. The substantive law of

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5— "This court has already indicated orally from the bench and now states again that the three ledgers (Exs. B13-A, B and C) on their face show that as of May 13, 1960, Gates began embezzling monies due Collier under the first contract and continued such embezzlements until Bennett discharged him as Collier's representative in Japan and took over the business on May 2, 1962. The two weeks' notice provided by the contract was obviously intended to apply to a voluntary termination of the contract—without involving any such gross and criminal breach thereof, as found here. By May 2, 1962, Bennett had before him clear and positive proof of Gates' fraud. Bennett's letter of discharge on May 2 and his acts immediately thereafter constituted ample notice to Gates that the contracts were forthwith terminated, and for what reason. Nork's actions in Australia, likewise gave the same notice. Under the factual circumstances, the two weeks' notice referred to in the contract had no application. The breach by Gates was so substantial and fundamental as to completely destroy the personalized foundation of the contracts and negated any possibility of Gates being permitted to continue to run Collier's Japan and Australian operations. Failure to terminate promptly after discovery of Gates' fraud would have waived the breach. All Collier-Gates contracts were terminated as of May 2, 1962." (Rec. 696-697)

fraud of Japan as a basis for civil action for damages or as a defense was not introduced in evidence. After a clear warning by Gates that the law of Japan must be proven by Collier if it is to rely on the defense of fraud, Collier clearly disregarded said warning and did not prove said law. Gates even notified Colliers in open Court about the holding of the Court of Appeals in *Philip* v. *Macri*, 1958, 9 C.C.A., 261 F. 2d 945, 75 A.L.R. 2d 523 (hereafter discussed).

The above article in 50 A.L.R. 2d 254 well discusses the law but it is also stated in 16 Am. Jur. 25 as follows:

> "The broad, uncontroverted rule is that the lex loci will govern as to all matters going to the basis of the right of action itself . . ." 16 Am. Jur. 2d 25.
>
> See: *Central Vermont Ry. Co.* v. *White*, 238 U.S. 507, 59 L.Ed. 1433, 35 S. Ct. 865; *Cuba R. Co.* v. *Crosby*, 222 U.S. 473, 56 L. Ed. 274, 32 S. Ct. 132; *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 53 L. Ed. 826, 29 S. Ct. 511; *Scudder* v. *Union National Bank*, 91 U.S. 406, 23 L. Ed. 245; *Brown* v. *Ford Motor Co.*, (1931, C.C.A. 10, Okla.) 48 F. 2d 732; *Repsold* v. *New York Life Ins. Co.*, (1954, C.C.A. 7, Ill.) 216 F. 2d 479.

It is also the general federal law on this subject. In *Sperry Rand Corporation* v. *Industrial Supply Corporation*, (C.C.A. 5) (1964) 337 F. 2d 363, the court stated:

> "The Supreme Court has stated, as the general conflicts rule pertaining to contracts, that matters bearing upon the execution, interpretation and validity of a contract are determined by the law of the place where it is made; matters connected with its performance are regulated by the law prevailing at the place of performance; and matters respecting the remedy depend upon the law of the place where the suit is brought. Scudder v. Union National Bank, 91 U.S. 406, 23 L. Ed. 245."

There is no necessity of changing this general law and it should be applied to this case in the absence of controlling Hawaii State decisions.

As applied to this case some attention must be given the intention of the parties. *That the intention of the parties was that the Law of Japan should apply to the contracts of 1960 and 1961 is clear from the following provision contained in "Procedure For Opening Tokyo Branch Japan."* (Plaintiff's Exhibit 9)

> "10. *Salesmen—Independent Contractors*:
>
> The law (meaning the law of Japan) governing free lance is basically very similar to that in the United States in that a free lance salesman dealing strictly on a commission basis will be considered an independent contractor, and the company would not be liable to third parties as employer." (page 4)
>
> "7. *Japanese Bank Account*:
>
> (d) All yen collected will be deposited, but the amount remitted will be the amount limited as per our Import License" (page 3)
>
> "8. *Tax Liability*:
> As advised by Tokyo Attorney, Mr. James S. Adachi, the Branch of a foreign corporation in Japan is treated as a separate entity...." (page 4)

It is submitted that the foregoing was equivalent to a stipulation in the contract that the parties shall be governed by Japanese Laws. Parties may agree in their contracts as to what law shall apply. 16 Am. Jur. 2d 71, Section 46. *Aluminum Co.* v. *Hully,* (C.C.A. 8) (1952) 200 F. 2d 257; *Overseas Trading Co. S. A.* v. *United States,* 141 Ct. Cl. 561, 159 F. Supp. 382; *Boole* v. *Union Marine Ins. Co.,* 52 Cal. App. 207, 198 Pac. 416.

Collier attempts to argue that the "center of gravity" or "grouping of contracts" rule should govern this case. (Ans. Br. 23) The Court of Appeals was swayed by this argument and adopted it in its decision. But in the very jurisdiction (N.Y.) Collier says the laws whereof should apply, the "center of gravity" or "grouping of contracts" rule is subject to a recognized exception that when the parties contract with the law (Statutory) of some particular jurisdiction in view, the law of that jurisdiction will be applicable in determining the interpretation and validity of the contract, as the law which the parties presumably intended to be controlling. *Hausman* v. *Buckley*, (C.C.A. 2) (1962) 299 F. 2d 696, 93 A.L.R. 2d 1340. In the said case, a derivative action by a minority shareholder of a Venezuelan Corporation was dismissed for the following reasons:

> ". . . Thus defined, we think it is clear that Appellants' position cannot prevail. A rule which provides that the enforcement of corporation claims through derivative actions must be undertaken pursuant to the will of a majority of its stockholders reflects a deliberate policy that such actions ought to be brought not only when the claims may have merit but when the stockholders, as a body, are of the opinion that the corporate welfare is best promoted by suing upon them. The issue is not just 'who' may maintain an action or 'how' it will be brought, but 'if' it will be brought." . . .
>
> "'*But a statute of the place where the right arose may impose upon it a condition which goes to its substance*, and, when this is so, the condition will be observed elsewhere. This has ordinarily come up in the case of statutory rights in which the limitation was imposed by the same statute which created the right itself. . . . But it is not necessary that the limitation should be in the same statute, so the purpose be plain to make it a condition.' Wood & Selick, Inc. v. Com-

pagnie Generale Transatlantique, 43 F. 2d 941, 942-943 (C.C.A. 2, 1930) (L. Hand, J.)." (Emphasis ours)

See also:

Pinney v. *Nelson*, 183 U.S. 144, 22 S. Ct. 52.

Levy v. *Daniels U-Drive Auto Renting Co.*, (1928) 108 Conn. 333, 143 Atl. 163.

Bradford Electric Light Co., v. *Clapper*, (1932) 286 U.S. 145, 52 S. Ct. 571 (Rt. by way of defense).

Broderick v. *Rosner*, 294 U.S. 629, 55 S. Ct. 589.

Broderick v. *McGuire*, (1934) 119 Conn. 83, 174 Atl. 314.

In the present case the contract contemplated sales in Japanese Yen and it contemplated conversion of said yen into U. S. Dollars. As admitted by the parties, an Import License was absolutely necessary and the Japanese Foreign Exchange Control Act was interwoven in the contract. Charges of fraud by Colliers necessarily involved defenses by Gates involving the said Exchange Act. It was illegal to remit the $172.50 anyway, as heretofore argued, and the Japanese statutes regarding expenses to be paid by a mandatory are all a part of petitioner's case. Japan being a civil code nation, it is ridiculous to weigh the acts of petitioner in New York by using New York's common law. Both of the Japan Sales Contracts between Gates and Colliers would have been useless if Colliers couldn't get U. S. Dollars out of Japan. The Japanese Foreign Exchange Act was the backbone of the Tokyo contract and it was as much a part of the contract as the law of Venezuela was with relation to shareholder's rights of Venezuelan corporations in *Hausman* v. *Buckley* above-mentioned. Where foreign statutes are involved the courts will enforce the foreign statutes together with the law of that country (Japanese law in the present case).

The foregoing exception stated in *Hausman* v. *Buckley* applies to tort cases as well. See: *Bradford Electric Light Co.* v. *Clapper, supra*; *Pearson* v. *Northeast Airlines*, (C.C.A. 2) (1962) 309 F. 2d 553, 92 A.L.R. 2d 1162.

And finally just for argument, without admitting, if the "center of gravity" theory is to be applied in this case Japan was the "center of gravity", the place *"which has the most significant contacts with the matter in dispute"*. The case of *Auten* v. *Auten*, (1954) 308 N.Y. 155, 124 N.E. 2d 99, relied upon by Colliers on page 23 of its Answering Brief was a case involving domestic relations. In that case the court based its decision on the marital situs of the parties, England. The center of gravity of the contracts in this case is what the parties in their contract designated by agreement as headquarters of the "Asiatic Division of Collier" (Plaintiff's Exhibits 1 and 2), that is to say Tokyo, Japan; Colliers registered itself under the Japanese laws intending to be covered in its activities by the Japanese law and treated as a separate entity (Plaintiff's Exhibit 9, page 4); it paid Japan income taxes; Gates had purchased a place of business as well as a home in Tokyo, Japan; Gates was to sell in Japanese Yen and convert it into U. S. Dollars (In *Auten* v. *Auten, supra*, the court emphasized that payments were to be in pounds); the remittances were governed by the Japanese Foreign Exchange Act by Import Licenses; the alleged fraud (if any) all took place in Japan; Colliers received its licensed import payments as per license in the total sum of $204,632.50 (Op. Br. 52); Colliers complains in this case that the alleged defrauded amounts should have been deposited in Collier's Tokyo bank account, in other words the alleged non-payment (if any) took place in Tokyo; the Japanese court in Tokyo issued an injunction when a dispute arose; the effect of this Japanese Court Injunction is one of the critical issues in this case (Op. Br.

39); Colliers and Gates first sued each other in the Japan courts on this cause of action; Collier's 15 independent contractor salesmen (determined as per agreement by Japanese law) in Japan were Japanese; basic records of the business were kept in Japanese; Colliers maintained an inventory of books in Japan; sales were made in Japan; a complicated debtor and creditor relationship in Japanese Yen developed in Japan between Gates and Collier (Tr. 89-90); the multitude of buyers were Japanese; Collier's auditors audited Gates' books in Japan; most Collier report forms were filled in and made in Japan; collections were made in Japan and all other acts incident to all the foregoing were all done in Japan. In such cases, even under the center of gravity cases, the law of the place where the goods were sold becomes applicable. See especially *Sperry Rand Corporation* v. *Industrial Supply Corporation*, (C.C.A. 5) (1964) 337 F. 2d 363, where the Court held the law of Florida where the computer mechanism was sold as being applicable and stated:

> "In Pennsylvania the law of the place of performance would govern. Victorson v. Albery M. Green Hosiery Mills, Inc., 3rd Cir. 1953, 202 F. 2d 717, 41 A.L.R. 2d 806; Texas Motorcoaches v. A.C.F. Motors Co., 3rd Cir. 1946, 154 F. 2d 91. Such is also the rule of Delaware. Fairbanks, Morse & Co. v. Consolidated Fisheries Co., 3rd Cir. 1951, 190 F. 2d 817. The same doctrine is said to apply in Ohio. Delta Tank Manufacture Co. v. Weatherhead Co., D.C.N.D. Ohio, 150 F. Supp. 525, aff. 6th Cir. 1958, 254 F. 2d 602. In New York the newly developed center of gravity theory would be applicable. Royce Chemical Co. v. Sharpless Corporation, 2nd Cir. 1960, 285 F. 2d 183; Auten v. Auten, 308 N.Y. 155, 124 N.E. 2d 99, 50 A.L.R. 2d 246.
>
> "The modern text writers seem to favor the *application of the law of the situs of the property at the time of the sale.* See 15 C.J.S., Conflict of Laws, § 18d, pp. 929-930, 11 Am. Jur. 355, Conflict of Laws, § 69; 2

Beale, Conflict of Laws 981 et seq., §§ 255.5, 256.1-258.1; Lalive Transfer of Chattels in the Conflict of Laws 48-59, 142; Carnahan, Tangible Property and the Conflict of Laws, 2 U. of Chi. L. Rev. 345; Rest. Conflict of Laws, §§ 255-259." (Emphasis ours)

The Circuit Court of Appeals found New York to be the center of gravity as follows:

"There is much to be said in support of such a conclusion. Collier's place of business was in New York; the books were manufactured and produced in New York; the contract between the parties was negotiated in New York; Gates spent some time in New York conducting bargaining sessions there; the contract was executed in New York and signed by both parties there. *Under the contract Gates was to forward all orders for books to Collier in New York; when they reached Collier, Collier was permitted to accept or reject them; dollar sales payments were to be sent to New York; other collections would be remitted to New York daily together with executed forms indicating the numbers of the accounts; an 'imprest' fund designed to be available to Gates for his commissions and expenses in connection with dollars sales was established in New York; Gates was to send to Collier at New York lists of all checks drawn on this 'imprest' fund.* Gates sent the false and fraudulent orders and reports to Collier's New York office and Collier there relied on them and suffered loss. The most convincing factor which points to New York as having the most significant relationship to these transactions is that Tokyo was only one of numerous foreign agencies Collier was operating. Its home office in New York directed them all. The company's broad interest generally in establishing foreign markets is plain from the company president's testimony." (Emphasis ours)

Petitioner points out that the italicized portions were all illegal under the Japanese Foreign Exchange Control Act.

Therefore the law of Japan controlled but Colliers failed to prove the substantive law of fraud in Japan. In the absence of such proof the Appellate Court did a strange thing. It took the word of counsel for Collier, Mr. Brown, that the law of Japan in the area of mandates applies to this case. Counsel Brown is far from being an expert in Japanese law. He is not a member of the Japan Bar. The Court quoted certain sections relating to mandates from the "Civil Code of Japan" Exhibit 100 and stated that "We cannot perceive that the application of Japanese law under the Civil Code of Japan would have required any different result than that reached by the Court". It is strange that certain other material sections of the Civil Code with relation to mandates were not quoted by the Court (From Exhibit 100):

(Payment of expenses in advance)

"Article 650—If a mandatory has defrayed any expenses which are considered necessary for the management of the affairs entrusted him, he may demand from the mandator the reimbursement of such expenses with interest from the day on which they were defrayed".

"If a mandatory has assumed an obligation which is regarded as necessary for the management of the affairs entrusted to him, he may require the mandator to perform it in his place, and if the obligation is not due, to furnish security".

Under the facts in this case, Gates was to pay all Tokyo expenses and he became obligated to his salesmen for the 34% commission. This was necessary to manage the business. Did Gates have a right to make the mandator pay for the expenses? Did Gates have a right to have the mandator furnish security? What is the Japanese law in view of the above statutes in relation to such a situa-

tion? The record is clear that Gates owed Colliers dollars and Colliers owed Gates yen—the Civil Code (Exhibit 100) provides in Articles 505-512 for set offs. Can set offs of yen in Japan and Dollars in United States be accomplished where the Japanese Exchange Control Law prohibits such set offs.

It is submitted that the Court by taking Mr. Brown's non-expert suggestions instead of requiring proof of substantive law of fraud by a person who is an expert in Japanese law did gross injustice to petitioner. Collier completely failed in its proof of foreign law.

With relation to the problem of the proof of foreign laws Section 226-3 of the Revised Laws of Hawaii, 1955, provides as follows:

> "Sec. 226-3. Laws of foreign country. The law of a jurisdiction other than those referred to in section 226-1 . . . (which refers to laws of other states and territories of the United States) shall be an issue for the court, but shall not be subject to the foregoing provisions concerning judicial notice. (L. 1941, c. 110, s. 5; R. L. 1945, s. 9933)"

Section 224-6 provides as follows:

> "Sec. 224-6. Uniform proof of statutes. Printed books or pamphlets purporting on their face to be the session or other statutes of any of the United States or the territories thereof, or of any foreign jurisdiction, and to have been printed and published by the authority of any such state, territory or foreign jurisdiction or proved to be commonly recognized in its courts, shall be received in the courts of the Territory as prima facie evidence of such statutes. (L. 1927, c. 109, s. 1; R. L. 1935, s. 3837; R. L. 1945, s. 9885.)"

On the problem of the proof of foreign laws in *Walton* v. *Arabian American Oil Co.*, (1956, C.C.A. 2) 233 F. 2d

541, a case in which plaintiff was injured in an auto accident in Arabia and with relation to the basis of recovery, the law of negligence in Arabia, the court held:

> "The general federal rule is that the law of a foreign country is a fact which must be proved. (Footnote cases: Black Diamond S. S. Corp. v. Robert Stewart & Sons, 336 U.S. 386, 396-397, 69 S. Ct. 622; Cuba R. Co. v. Crosby, 222 U.S. 473, 479, 32 S. Ct. 132; Liverpool and G. W. Steam Co. v. Phoenix Ins. Co., 129 U.S. 397, 9 S. Ct. 469.)"

The Ninth Circuit Court in *Philip* v. *Macri*, (1958, C.C.A. 9) 261 F. 2d 945, 75 A.L.R. 2d 523, a libel (defamation) action arising in Peru and governed by the law of Peru where the Peruvian law was not proven, held that the law as given in *Cuba R. Co.* v. *Crosby*, 222 U.S. 473, 32 S. Ct. 132 was still the law. The Cuba R. Co. case is quoted in the above Arabian Oil case.

Where one depends on a foreign law as a defense, if the foreign law is not proven, such a defense is unavailable to defendant. *Askanian* v. *Dostumian*, (1809) 174 Mass. 328, 54 N.E. 845; *Western U. Tel. Co.* v. *Way*, 83 Ala. 542, 4 So. 844.

And where one relies on a foreign law to recover as Colliers does in its counterclaim, upon failure of proof of foreign law, the case is dismissed. *Cuba R. Co.* v. *Crosby*, 222 U.S. 473, 32 S. Ct. 132; *Walton* v. *Arabian American Oil Co.*, 233 F. 2d 541. Respondent's counterclaim based on embezzlement, fraud and criminal breach should be forthwith dismissed. Its defense based on fraud should be denied. In these cases as well as in this Court's above quoted *Philip* v. *Macri* (*supra*), dismissal without a remand to the lower court was the final order. It isn't that Collier didn't know, but where it was warned of this Court's decision in *Philip* v. *Macri*, Collier must take the consequences of its wilful disregard of the said opinions.

Without a defense of fraud, Colliers is clearly without a defense under Count Four of the amended complaint. (Rec. 365) Count Four covered Japanese Civilians and Schools (97B and 99B accounts).

Colliers has always been without a defense under Count Two (Australia 98B) and Count Three (Military 96B) because Collier has admitted that Gates is not guilty of any alleged fraudulent conduct in Australia or under the military portion of the contracts.

V

Trial Court Erred in Finding That the Tokyo District Court Pro-Tem Decree Was Fraudulently Obtained.

With relation to the Tokyo District Court Order, the Trial Court found as quoted in the footnote 6.[6]

The Tokyo District Court Order is admitted by Collier in its sworn answer No. 16 filed November 10, 1964. (Rec. 169) The gist of the order is stated in interrogatory No. 16.

6—". . . The court finds the defendant's claim that the action in Japan was brought by Gates for the deliberate purpose of injuring Collier and was without any foundation in truth, in fact, or in law, is true. The court has reviewed the affidavit upon which Gates made his application for the restraining order and after hearing all of the evidence, including the testimony of Gates himself, the court finds that Gates' claims in his affidavit of June 8, 1962, that he was still the representative in Japan of Collier, that the board of directors had taken no action to discharge him as representative, and that Bennett misunderstood Gates' explanation of Japanese business on May 2, 1962, and that the board of directors did not issue a resolution to discharge Gates as a representative in Japan was false, and Gates knew it was false at the time he made the statement. At the time, Gates knew that the board of directors had already taken away all powers from him. The court finds that the Japanese court action was but part of Gates' wilful attempt to implement his fraudulent acts of embezzlement and to postpone the day of reckoning."

(Rec. 120) The order was received in evidence as Court's Exhibit A.

It is submitted that the Trial Court's finding of "fraudulent acts of embezzlement" in this respect is again based on the laws of Japan regarding embezzlement and the substantive law of fraud. The Trial Court's finding is therefore subject to the same objection that there was no proof of the Japanese law, as argued herein in Paragraph IV above. Said arguments are hereby incorporated by reference.

Furthermore it is elementary that "a judgment of a sister state cannot be challenged on the ground that it was obtained by false testimony or perjury." 55 A.L.R. 2d 702. *Littlefield* v. *Payner*, 111 Kan. 201, 206 Pac. 114; *McDonald* v. *Drew*, 64 N.H. 547, 15 Atl. 148; *Crescent Hat Co.* v. *Chizik*, 223 N.C. 371, 26 S.E. 2d 871; *Hecht* v. *Alton*, (Texas) 59 S.W. 2d 428; *Allard* v. *La Plaia*, 147 Wash. 497, 266 Pac. 688.

It is further stated in said authority that, "Fraud in the transaction upon which the action is based is not fraud available as a defense against a judgment in that action when sued upon in a sister state." 55 A.L.R. 2d 704. See: *Berman* v. *Diamond*, (1952 D.C.) 196 F. 2d 590; *Mahoney* v. *State Ins. Co.*, (1907) 133 Iowa 570, 110 N.W. 1041; *Lovejoy* v. *Ashworth*, 94 N.H. 8, 45 A. 2d 218. The same comity should be applied to courts of other Sovereign Nations.

In *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 84 S. Ct. 923, this Court approved the following, with relation to a Cuban decree:

> "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the

acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves."

The Tokyo Court Order was entered on June 2, 1962, and it is still outstanding. (Rec. 120 and 169) The trial court's amended decision was filed on July 8, 1966. (Rec. 688) If it was fraudulently obtained Collier's should have voided the order in the Tokyo Court at least after this suit was started on July 9, 1964, and before trial was started on April 18, 1966. (Tr. 1)

VI

Assuming That Petitioner's Arguments in Paragraphs I, II, III, IV and V of This Brief Are Untenable, Collier's Evidence Was Insufficient to Sustain Court's Judgment on Counterclaim and Colliers Did Not Prove Any Defense of Fraud.

Assuming that Petitioner's arguments in Paragraphs I, II, III, IV and V are untenable to this Court, Gates still maintains that Colliers cannot recover on its counterclaims based on fraud and Colliers did not establish its defense of fraud:

A.—96B (Military), 98B (Australia) and 97B and 99B (Japanese Civilian and Schools) Were Divisible Portions of Contracts; Fraud If Any Concerned 97B Only.

At this point it will be helpful to this court to advance Gates' arguments regarding divisibility of the Contracts of April, 1960 (Plaintiff's Exhibit 1 in Evidence) and September, 1961. (Plaintiff's Exhibit 2 in Evidence)

Prior to April 15, 1960, there were two separate contracts, Plaintiff's Exhibit 5 (Japanese Civilian) and Ex-

hibit 4 (Military). Each was a separate operation in that Exhibit 4 (Military) was a U. S. Dollar operation and Exhibit 5 (Japanese Civilian) was a Japanese Yen operation. After April 15, 1960, these two operations were put into one contract (Plaintiff's Exhibit 1 in Evidence) but because the two operations were still operated on different currencies, U. S. Dollars and Japanese Yen, they were kept separate operations. Accounts 96B and 97B were separate in sales personnel in that Japanese salesmen were used and the sales were in Japanese Yen (Defendant's Exhibit B-13 ABC in Evidence); the contract forms were entirely different (Plaintiff's Exhibit 123 in Evidence); collections were handled separately and banked separately (Plaintiff's Exhibit 9 in Evidence) (Plaintiff's Exhibit 6 in Evidence); the military 96B was allowed an "Imprest Fund" while 97B did not have such a fund (Plaintiff's Exhibit 9 in Evidence); 97B remittances were by way of licenses and drafts (Plaintiff's Exhibits 11, 12, 14, 32 in Evidence); the accounting of the 97B and 96B was kept entirely separate (Plaintiff's Exhibits 75, 108, 120, 121); 97B orders were filled from Tokyo but 96B orders were sent out parcel post to military personnel; 97B term orders were allowed a 12-month period of payment while 96B term orders were allowed 24-month period of payment (Plaintiff's Exhibit 9 in Evidence) and Colliers did not pay any Japanese income taxes on its 96B Military operation while it paid taxes on the 97B operations. (Plaintiff's Exhibit 106 in Evidence) In other words the 97B and 96B accounts were as separate as the two separate operations under Plaintiff's Exhibits 4 and 5 aforementioned.

Witness Nork testified as shown in footnote below.[7]

7—"Q. Paragraph 1 reads: 'Branch number assigned is No. 96.' That was not followed?

"A. That was not followed.

"Q. Why?

With relation to the Australian contract the Trial Court found as follows:

"Towards the end of 1961, Collier and Gates decided to open up a Collier branch in Australia, and did so in January, 1962. However, as to the Australian operation, it was agreed that Gates would act as an independent contractor and not as an employee of Col-

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"A. Because we realized that we could not put all of this in one operation. That is to say, we could not mix up the military business together with the yen business. So it had to be separated. And we, therefore, had to create three different numbers, one for the schools and library sales, which was 99; the yen accounts were 97; and the military remained 96.

"So that is why this could not be followed.

"Q. Now, let's get to the school accounts. The school accounts were books sold to Japanese schools?

"A. Schools and libraries.

"Q. And these bore a special price?

"A. That's right.

"Q. But they were included with the Japanese sales in the monetary handling?

"A. In the banking.

"Q. In the banking?

"A. That's right, but not in the bookkeeping.

"Q. These were, Account No. 96 was the military account—right?

"A. Right.

"Q. What is the 'B' for?

"A. That means 'Branch.' We use that term in the States, on the Mainland, rather. 91-B would be Atlanta; 2-B is Chicago; 3, and so forth.

"Q. Now, with relation to 96, this was operated entirely separate and apart from the two Japanese yen accounts, the Japanese schools and Japanese civilians, separately?

"MR. BROWN: Your Honor, I object to the question on the ground that it isn't clear what he means by separate. Separate in what sense?

"THE COURT: Rephrase your question.

"Q. (By Mr. Kashiwa) For example, in the remittance of money, they were handled separately, weren't they?

"THE COURT: These three accounts, is that what you are asking?

"MR. KASHIWA: Yes.

"Q. (By Mr. Kashiwa) No. 96 was entirely separate from the civilian, the Japanese civilian?

"A. That's right." (Tr. 123)

> lier and would be entitled to a 36% basic sales commission. Collier would open its own branch there to handle only the cash accounts receivable and the inventory of books, all sales to be under the control of Gates." (Rec. 692)

It was not only a separate contract, it was an entirely separate operation.

See 17 Am. Jur. 2d 758, with relation to divisible contracts. See also *Pollak* v. *Brush Elect. Asso.*, 128 U.S. 446, 9 S. Ct. 119; *Trainman* v. *Pappaport*, (C.C.A. 3) 41 F. 2d 336, 71 A.L.R. 475; *Hutchison* v. *New York & P. Co.*, (C.C.A. 4) 229 Fed. 510.

It is submitted that 96-B (Military), 98-B (Australia) and 97-B and 99-B (Japanese Civilian and Schools) were all divisible portions. In fact the Australian contract was a separate contract as the Trial Court held.

There being three divisible portions to the contract, and Colliers having admitted that the alleged fraud, if any, concerned only 97B portion of the contract, it is submitted that Colliers did not have a defense to plaintiff's suit on the 96B (military) and 98B (Australia) portion of the contract. These contracts were only terminated by the notice of termination given after the September 28, 1962, meeting of Collier's Board of Directors (Plaintiff's Exhibit 89 in Evidence) two weeks prior to October 16, 1962. Gates' figures presented in Exhibit CC in appendix of this brief are based on a termination as of October 16, 1962.

As for the 97B portions of the contract, Gates maintains that Colliers failed in its proof in the particulars listed in Subparagraphs B, C, D and E to follow.

B.—Collier's, Exhibits B-13A, B and C Were Only Book Entries; No Conversion Was Proven, Therefore No Action in Fraud May Be Maintained.

This argument is directed to the 97B claim only in that Colliers admits that the alleged fraud was only in the 97B portion.

As heretofore argued, the Criminal Statute of Japan on Embezzlement was not introduced in evidence. There being no embezzlement statute proven, Colliers completely failed in its proof of conversion of any funds by Appellant. Appellant came into possession of the funds lawfully after the sale of the books with full consent of Colliers. It will be shown that Gates did with said funds exactly what he was ordered to do in writing by Collier. So where is the conversion of funds?

First of all, as it is well stated in 26 Am. Jur. 2d 609:

> "The mere making of false entries in books of accounts is not sufficient evidence of an act of conversion constituent to the crime of embezzlement. . . ."

It is important to note that Colliers did not supply Gates with any funds with which to start the Tokyo office. But out of the sale of each set of books for $269.50, Gates was allowed his 34% to pay his salespeople and send $172.50 to New York. If he gave a 5% discount to the customer, there was nothing left for him. Plaintiff's Exhibit 111 in Evidence well explains this on a 100 set basis. The arithmetic quoted in said Exhibit 111 is as follows:

Total selling value	$26,950.00
34% commission	–8,483.00
	$18,467.00
$172.50 per set remittance	–17,250.00
	$ 1,217.00

Discount	1,200.00
Left over in Tokyo	$ 17.00

The above letter from Gates to witness Nork was dated October 16, 1960, so Colliers well knew that Gates couldn't continue the Tokyo office because there were term sales as well as cash sales unless he utilized the following two written authorizations given by Collier:

1) "Terms: *Full amount of invoice* covering cost of books, payable in U. S. Dollars *in twelve (12) equal monthly installments,* starting thirty (30) days from the time this shipment of books has cleared through customs into Japan." (Rec. 130, 132) (Plaintiff's Exhibits 24, 26 in Evidence) (Emphasis ours) (This was also repeated in the Japanese Import Licenses).

2) "After the Tokyo Bank Account has sufficient yen deposits, the salespeople paid on yen accounts will be paid in yen from this account (Tokyo yen account)." Plaintiff's Exhibit 9 in Evidence at page 3.

The first authorization (1) permitted him to remit in 12 equal monthly installments the full amount of the invoices. (*It is important to realize that since this amounted to a U. S. Dollar allocation under the Japanese Foreign Exchange law, even if all books were sold cash on the day after the books arrived, Colliers was allowed to remit only on a 12 month basis in equal installments.*) (2) above the 34% commission ($84.83) under term yen sales where the down payment was for example only $10 may be paid because Colliers did not supply Appellant with an "Imprest fund" for Tokyo yen sales. (1) above supplied the necessary "slack" and (2) contemplated such a "slack" because as stated in Plaintiff's Exhibit 111 in Evidence nothing remained out of each $269.50 after the 34% Commission was paid, the $172.50 remittance sent to New York

and a discount given. The slack was a forced slack because petitioner couldn't send the yen sooner than at the times and amounts allocated to him.

In other words the forced "slack" was provided for in writing by Colliers. The very nature of the Japanese Exchange Act required remittance in 12 equal monthly installments. Collier's couldn't get its U. S. Dollars sooner and it agreed to this. It is submitted that where Colliers consented to the "slack" in writing, it cannot accuse Gates of fraud because it is elementary that there is no conversion when one consents.

The evidence in this case further shows the Japanese yen remittances (Rec. 139-146) from appellant in Tokyo to Colliers in New York converted into U. S. Dollars as shown in footnote 8 below.[8]

8—

July 1960	$1,000
September 1960	6,000
October 1960	5,500
November 1960	5,000
December 1960	9,500
January 1961	$16,500
February 1961	10,500
March 1961	17,500
April 1961	14,000
May 1961	15,500
June 1961	17,500
July 1961	18,000
August 1961	9,500
September 1961	11,250
October 1961	10,500
November 1961	10,000
December 1961	1,000
January 1962	$5,500
February 1962	13,200
March 1962	7,182.50
Total	$204,632.50

In other words in accordance with the invoices and the import licenses the amounts due were sent in accordance with (1) abovequoted. The sums were sent in lump sums, without earmarking the amounts remitted set by set. Collier was therefore concerned with the total remittance and this was to be on a 12-month equal payment basis. Each of the invoices were met under (1) above exactly in accordance with (1). Certainly there was a "slack" when cash sales remittances were not sent immediately but when Colliers agreed to 12 months equal payment, Colliers cannot object. That was the dollar allocation it received under the Japanese law and they were glad to receive it.

And payments to Gates of the 34% ($84.83) commission under term yen sales where down payments were less than $84.83 under consent (2) above, were certainly with Collier's written consent.

Payment for Japanese taxes were also made out of the already drained Tokyo yen account. (Plaintiff's Exhibit 106 in Evidence) Transportation Expenses for the Yokohama to Tokyo haul of books were also paid. (Plaintiff's Exhibit 115 in Evidence) Colliers permitted payment of Gates airline tickets from said account. (Plaintiff's Exhibit 84 in Evidence) Colliers knew that these excessive drains on the yen accounts also existed. How was Gates to pay these amounts when Colliers itself knew that the Tokyo Yen Account existed by reason of the "slack." Colliers gave Gates authority under consent 2 above quoted and he used it.

And finally Gates was appointed to operate the Tokyo office with a broad written general power of attorney. (Plaintiff's Exhibit 82 in Evidence) In the absence of an embezzlement statute, one given such a broad power of

attorney can never be held for conversion of funds where he is directed by other documents to do as he did.

Furthermore Collier's case is further weakened in that there was debtor and creditor relationship between Gates and Collier. The Trial Court found that there was no debtor-creditor relationship between Colliers and Gates but it is submitted that such finding is completely contrary to the evidence.

Witness Simon J. Nork testified as shown in the footnote below.[9]

For the 96B Military accounts there was an "impress fund" but for the 97B Japanese Civilian accounts no im-

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9— "Q. Now, will you refer to paragraph 5?

"THE COURT: Of Exhibit 1?

"MR. KASHIWA: Yes, paragraph 5.

"Q. (Continuing) Paragraph 5 with relation to the 34 per cent commission. All right, now, if there was a $269.00 order of encyclopedias, and there was a $10.00 down payment, the first payment, the first payment on that set, what was due Gates?

"A. The difference between the $10.00 that he retained and the 34 percent that he was supposed to receive, which will depend—

"Q. Assuming that it is $269.50, the 34 percent was about $84.00, am I right?

"A. Yes.

"Q. And so with $10.00 down, there would be about $74.00 owing to Gates?

"A. Correct.

"Q. That is the way it was operated?

"A. That is the way it is operated." (Tr. 89-90).

And he further stated:

"Q. Yes. And also you did testify that, for example, if there was a term sale with less than 34 percent payment, for example, 10 percent payment, then Collier would owe Gates the balance?

"A. That's right.

"Q. In other words, there was a lot of debit and credit going on?

"A. Correct. That will be explained by our accountant.

"Q. This was quite complicated, am I right?

"A. Correct." (Tr. 149-150).

press fund was provided. In other words on a term sale in Japanese yen, where there was a down payment of the yen equivalent of $10.00, Colliers immediately owed Gates ($84.83-10.00) $74.83. There were 1,404 term sales or a total of $119,101.32 ($84.83 x 1,404) was involved. So these term sales in Yen immediately created a creditor-debtor relationship.

A further debtor-creditor relationship was created in New York in that with relation to the $172.50 sent to New York for each set sold under the import licenses the $172.50 was made up of the following:

Collier's Right	
40.5%	$118.00
Gates' Rights	
12.5%	34.00
7%	17.00
1%	3.00
	$172.00

In other words some of Gates' own funds were sent to New York. (Tr. 386) With the debtor-creditor relationship in existence there was no embezzlement proven. Neither was fraud proven.

In 18 Am. Jur. 580, it is stated:

> "Sec. 20. Debtor and Creditor Relation.—Generally, when dealings between two persons create a relation of debtor and creditor, a failure of one of the parties to pay over money does not constitute the crime of embezzlement. For example, a laundry agent who is paid by commissions and who is charged with the entire amount of laundry work done stands in the relation of debtor to the laundry company. He holds money collected in such capacity and cannot be convicted of embezzlement. Similarly, a contract for the

sale of money creates a relation of debtor and creditor, and not one of trust, so that a failure to pay over the money does not constitute embezzlement.

"Ordinarily, whether the relation of debtor and creditor exists depends upon the facts of the particular case. Where a principal acquiesces in his agent's practice of depositing rents collected, on his general account, and of treating the deposits as his own, such a course of dealings may divest the principal of his specific property in the deposits and establish the relation of creditor and debtor between him and his agent."

See also: *MacGray* v. *Bennett*, 250 N.C. 707, 110 S.E. 2d 324; 26 Am. Jur. 2d 567; *U. S.* v. *Mason*, 218 U.S. 517, 31 S. Ct. 28.

It is submitted that therefore under the circumstances in this case there was no conversion proven. There was no fraud proven.

C.—Colliers Failed to Prove Alleged Fraud Proximately Caused Pecuniary Losses.

Assuming that the New York law applies, one of the (without admitting) most elementary rules of law in a civil action for damages based on fraud is that the complainant must prove "actual pecuniary loss" suffered as a proximate cause of the alleged fraud.

In the recent case of *Toho Bussan Kaisha, Ltd.* v. *American President Lines, Ltd.*, (1959, C.C.A. 2, N.Y.) 265 F. 2d 418, wherein the court held:

"(3, 4) The New York decisions make it plain that the recovery allowable for fraud is not punitive in nature. *The plaintiff is entitled to be indemnified only for actual pecuniary loss.* Hanlon v. Macfadden Publications, 1951, 302 N.Y. 502, 511, 99 N.E. 2d 546, 24 A.L.R. 2d 733; Ross v. Preston, 1944, 292 N.Y. 433,

436, 55 N.E. 2d 490; Sager v. Friedman, 1936, 270 N.Y. 472, 480-481, 1 N.E. 2d 971; see also Reno v. Bull, 1919, 226 N.Y. 546, 553, 14 N.E. 144 (even possible profits may not be recovered). We therefore find no merit in plaintiff's principal contention. (Emphasis ours)

"(5) The next question raised by this appeal is who has the burden of establishing plaintiff's actual pecuniary loss. This question is also governed by the law of New York. Palmer v. Hoffman, 1943, 318 U.S. 109, 63 S. Ct. 477, 87 L. Ed. 645; Sampson v. Channell, 1 Cir., 1940, 110 F. 2d 754, 128 A.L.R. 394, certiorari denied 310 U.S. 650, 60 S. Ct. 1099, 84 L. Ed. 1415.

"(6) Judge Dimock dismissed the plaintiff's action at the close of its case on the ground that it had failed to prove damages. We think Judge Dimock was correct. Under the law of New York plaintiff has the burden of establishing that the amount it paid out on the ten false bills exceeded any sum or sums which it may have received on account of this transaction. Merely proving that the money was paid out in reliance on false bills of lading is only part of the story. Sager v. Friedman, supra, 270 N.Y. at page 482, 1 N.E. 2d at page 974; Deutsch v. Roy, 1st Dept. 1934, 239 App. Div. 714, 268 N.Y.S. 606, affirmed 1935, 269 N.Y. 508, 199 N.E. 510; Woolson v. Waite, 158 Wisc. 764, 768, 286 N.Y.S. 619, affirmed 4th Dept. 1936, 247 App. Div. 855, 286 N.Y.S. 624. Here the record does not show that the plaintiff suffered any actual pecuniary loss."

The question therefore is whether Colliers proved *"actual pecuniary loss sustained as a direct result of the wrong."*

First of all the alleged fraud was only in the 97B (Japan Civilian) phase of the contracts. No fraud of any nature was proven in the 99B (Japan schools), 96B (Military) and 98B (Australian) phases of the contracts. Therefore without any fraud in these three phases (99B, 96B

and 98B) of the contracts there can be no damages caused by fraud. The trial court erred in allowing damages on the counterclaim to Colliers under the 99B and 96B phases of the contracts. The Trial Court found as follows:

> "His calculations (Collier's Accountant, Rabinowitz) made on a basis most favorable to Gates, showed that out of a gross sales of over $1,069,549 Gates' liability under the 12.5% clause for 96B (military) and 97B (Japan Civilian) accounts, as well as the 10% liability clause on the 99B Japan schools accounts was $185,822. Only the Australian accounts reflected a credit due Gates on term business. As indicated by the calculations of Rabinowitz, Gates still owes Collier $169,013 under the contracts."

The figure $169,013 broken down (Defendant's Ex. R. 48 in Evidence) was as follows:

96B (Military)	$54,366
99B (Japan Schools)	27,052
97B (Japan Civilians)	90,150
98B (Australia)	(2,555)
(this was a plus figure)	

It is submitted that the court erred in allowing for 96B $54,366 and for 99B $27,052. The 98B figure of only $2,555, although a plus figure was in error in that it should have been plus $351,699.83. (See Exhibit CC, appendix herein.)

As for the 97B (Japan Civilian) figure of $90,150 the Trial Court was in complete error in that only losses proximately caused by the alleged fraud may be assessed against Appellant. The alleged fraud if any, committed by Collier's Exhibit B-13 A, B and C (as shown by Argument B above) did not cause any loss or damage to Colliers. The whole plan of the Tokyo office set up, started without any funds and requiring remittance of practically all remaining out of the $269,50 gross sales price, after the 34% commission is

paid and 5% commission given revolved about these two clauses:

> 1) "Terms: Full amount of invoice covering cost of books payable in U. S. Dollars in twelve (12) equal monthly installments, starting thirty (30) days from time this shipment of books has cleared through customs into Japan." (Rec. 130, 132)
>
> 2) "After the Tokyo Bank Account has sufficient yen deposits, the sales people paid on yen accounts will be paid in yen from this account." (Plaintiff's Exhibit 9 in Evidence)

As argued fully in Paragraph B above Colliers agreed by (1) above to a "slack" in the remittance of funds and Colliers agreed by (2) that said "slacked" funds may be used to pay the term yen sale 34% commission which Colliers owed the salesman if the down payment was only $10.00 for example. Nothing was lost by Colliers by the "slack." It even consented to the "slack." It couldn't obtain U. S Dollars sooner. And payment of what Colliers owed already certainly was not a "pecuniary loss." Colliers wanted the salesman to be paid by using funds caused by the "slack." Colliers consented in writing by (1) and (2) above. How could it represent that any pecuniary losses were incurred?

Being unable to prove a loss proximately caused by the alleged fraud, if any, Colliers shifted in midstream of its case to proving contractual liability under the 12½% and 10% clauses of Plaintiff's Exhibits 1 and 2 in Evidence. As it will be shown in Paragraph D to follow, Colliers is precluded from doing this in that it elected to sue in tort and it may not now seek to restore a rescinded contract and bring to life what is considered "annihilated."

D.—Colliers Rescinded Its Contract of September, 1961 and Cannot Sue for Future Liabilities to Arise under the Said Contract.

As for the April 15, 1960, contract (Plaintiff's Exhibit 1 in Evidence) the evidence is that Colliers was fully paid for in its 97B portion in that Colliers paid the 12½% commission thereunder in the sum of $18,834.24. (Tr. 386) The first payment was for $9,353.25 for sales numbers 97B 1-303. (Tr. 386) The last payment is evidenced by Plaintiff's Exhibit 93 in Evidence showing payment of $9,480.99 for accounts 304 to 607. Plaintiff's Exhibit 75 in Evidence, a document prepared by Colliers, shows only 607 sales by P. F. Collier & Son Corp. It shows no loss to P. F. Collier & Son Corp. (See also Plaintiff's Exhibit 121 in Evidence) so a full 12½% was paid. It is submitted that since there was no loss, no action for fraud could be maintained on said contract of April 15, 1960. *Toho Bussan Kaisha, Ltd.* v. *American President Lines,* (1959, C.C.A. 2) 265 F. 2d 418.

As for the September, 1961, contract (Plaintiff's Exhibit 2 in Evidence) Colliers chose to terminate the contract by a written notice (assuming for this argument that it was a valid notice). Colliers thereby rescinded the contract and it cannot again enforce any liabilities arising under the contract subsequent to May 2, 1962. Election to sue in tort for the alleged wrong done under Colliers' Exhibit B-13 A, B and C covering the period May, 1960 to May, 1962, also meant a rescission of the contract of September, 1961. The contract is "annihilated" by the rescission and Colliers may not enforce any rights under the contract under any assumption that the contract was in existence.

In 25 Am. Jur. 2d 674 under the topic "Election of Remedies," with relation to the effect of election it is stated:

"Where a party, with knowledge of the facts, and in the absence of fraud or imposition makes an election between inconsistent remedies, and the one chosen by him is not a mistaken remedy, his election is final, conclusive and irrevocable, and constitutes an absolute bar to any action, suit, or proceeding inconsistent with that asserted by the election."

United States v. *Oregon Lumber Co.*, (On Certificate to Sup. Ct. from 9 C.C.A.) 260 U.S. 290, 43 S. Ct. 100;

Karapetian v. *Carolan*, 83 Cal. App. 2d 344, 188 P. 2d 809, 1 A.L.R. 2d 1075;

Holscher v. *Ferry*, 131 Colo. 190, 280 P. 2d 655;

Davidson v. *McKown*, 157 Kan. 217, 139 P. 2d 424, 6 A.L.R. 2d 1;

Labor Hall Ass'n v. *Danielsen*, 24 Wash. 2d 75, 163 P. 2d 167, 161 A.L.R. 1079;

Boeing Airplane Co. v. *Aeronautical Industrial Dist. Lodge*, (D.C. Wash.) 91 F. Supp. 596, aff'd (9 C.C.A.) 188 F. 2d 356, cert. den. 342 U.S. 851, 72 S. Ct. 39;

Bankers Trust Co. v. *Pacific Employers Inc. Co.*, (C.C.A. 9, Nev.) 282 F. 2d 106, cert. den. 368 U.S. 822, 82 S. Ct. 41;

White Oak Coal Co. v. *United States*, (C.C.A. 4) 15 F. 2d 474, cert. den. 273 U.S. 756, 47 S. Ct. 459.

The Trial Court in its original decision of June 21, 1946, well aware of this rule of rescission held at page 10 of said decision as follows:

"The breach by Gates was so substantial and fundamental as to completely negate and destroy the objects of the contract. Failure to *rescind* promptly after discovery of plaintiff's fraud would have waived the breach. The contracts were *rescinded* and terminated as of May 2, 1962." (Rec. 635)

The court in its amended decision after Appellant filed its motion for new trial (Rec. 658) changed the above

paragraph so that the first "rescind" was changed to "terminate" and the second rescinded was eliminated (Rec. 697). The Trial Court attempted to correct its error but it is submitted that "termination" is rescission under the circumstances of this case. *Boeing Airplane Co.* v. *Aeronautical Industrial District Lodge*, (9 C.C.A., 1951) 188 F. 2d 357 held:

> "We have examined the entire record and are satisfied that the learned district judge correctly concluded, in the light of the terms of the contract and all the circumstances of the case that at the time immediately after the strike began when Boeing elected to terminate the contract the union had been guilty of a material breach which fell short of abandonment or total repudiation of the contract. *The power of termination which accuses the wronged party as a result of such a breach and was exercised by Boeing in this case is a right of rescission* which leaves neither party with any basis thereafter to complain of the conduct of the other as a breach of the contract." (Emphasis ours)

The Ninth Circuit Court completely approved the lower Court's opinion in 91 F. Supp. 596, 609. The lower Court's opinion is well written.

It is submitted that by the very nature of the September, 1961, contract, Plaintiff's Exhibit 2 in Evidence, under paragraph 10 thereof in which Gates guaranteed the collectability of term sales (the 12½% and 10% clause) the collectability of the accounts was to be determined for the 97B accounts in the following manner:

> "It was contemplated by both parties that there might be losses on account of bad accounts—Collier expecting a loss of 12.5% on the total amount of accepted orders. In order to induce good, collectible business, on 24-month contracts a monthly analysis would be made 30 months from the month in which

the business was reported and on a 12-month contract—15 months. If a contract was not paid in full at the end of either 30 or 15 months, it was classified as a loss. If the losses were below 12.5%, Gates was to get the difference between the 12.5% and the actual percentage loss ratio incurred. If the actual loss ratio exceeded 12.5%, Gates was to pay Collier the difference between 12.5% and the actual percentage of loss over that figure." (Rec. 627-628)

In May, 1962, only eight months of the allowed 15 months period had passed under the 97B contract and only eight months of the allowed 30 months period had passed under the 96B contract. Because of this 12½ guarantee clause the contract was not one forthwith terminable. Colliers was bound to allow the respective 15 months period or the 30 months period to go by before determining the guaranteed amount. Colliers had a right to do this but by its early termination, it rescinded the contract and Appellant cannot be held liable for obligations to arise in the future under the rescinded contract.

The Trial Court followed witness Rabinowitz's testimony and held as follows:

"As indicated above, defendant had an exhaustive study of all of the Gates' Japan and Australian accounts made by Rabinowitz. In his calculations, Rabinowitz gave Gates full credit for all sales up to and including May 2, as if Gates had not committed fraud and embezzlement. *His calculations, made on a basis most favorable to Gates, showed that out of gross sales of over $1,069,549, Gates' liability under the 12.5% clause for 96-B Military and 97-B Japan Civilian accounts, as well as the 10% liability clause on 99-B Japan schools accounts was $185,822.* Only the Australian accounts reflected a credit due Gates on term business. As indicated by the calculations of Rabinowitz, Gates still owes Collier $169,013 under the contracts."

In other words the Trial Court did the very thing the Court of Appeals prohibited in the Boeing case. One cannot terminate a contract of the nature in this case and later say that it did not rescind the contract.

The Trial Court erred in deciding that there was $169,013 due under the 12½% and 10% clause. The figure $169,013 is based on Collier's Exhibit R-48 in Evidence, Plate #3. It clearly shows that the 12½% and 10% clause was used. Furthermore even if the clause is used there was no "loss" to Colliers proven as required under said 12½% and the 10% clause. See Exhibit EE, page A24 hereof.

VII

Allowance of Attorney's Fees and Travel Expense Not Proper Allowances.

The amounts of $25,000 for attorney's fees and $11,011.99 for travel expenses, included in the Judgment below should be forthwith deducted. Under the ruling of this Court in *Fleischmann Distilling Corporation* v. *Maier Brewing Co.*, ... U.S. ....., 87 S. Ct. 1404, this was reversible error.

CONCLUSION

It is submitted that this Court issue a writ of certiorari for the grounds submitted in this brief and judgment should be reversed and judgment be entered for petitioner.

Dated: October 13, 1967.

Respectfully submitted,

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